FAIR EXCHANGE

Reforming Trade Remedy Laws

edited by
Michael J. Trebilcock
and
Robert C. York

C.D. Howe Institute

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Foreword

The technical world of international trade laws has, until recently, been the exclusive domain of government officials and trade law experts. However, the increasing and now widespread use of trade remedies — import duties and the like — in many countries has brought these practices to the attention of a larger political and private-sector audience.

The aggressive use of trade remedy laws by one country, the United States, in particular has been in response to actual (and perceived) unfair trade practices by its trading partners. These practices principally, but not exclusively, involve government support for domestic exports and the predatory pricing of foreign companies in the home market. Thus, trade remedy laws have become crucial to the process of creating a "level playing field." As international trade remedy laws now stand, however, they remain ineffective in carrying out that function.

In *Fair Exchange: Reforming Trade Remedy Laws*, edited by Michael J. Trebilcock, Faculty of Law, University of Toronto, and Robert C. York, Senior Policy Analyst, C.D. Howe Institute (currently on leave at the OECD), several prominent trade law experts suggest ways in which the rules can be amended, and in such a way that they do not themselves become barriers to fair trade. This is no easy task. Trade remedy laws have been "privatized" to some extent. That is, many businesses in the import-competing sector have now found ways to use the laws to limit foreign competition. The use of antidumping duties — those duties applied in response to predatory pricing practices — is a case in point. Other examples abound, and are analyzed in detail in the following pages.

This study is the result of a collaborative effort between the International Business and Trade Law Programme of the Faculty of Law at the University of Toronto, the Research Programme of the Ontario Centre for International Business, and the C.D. Howe Institute. It is based on invited papers and comments presented at a colloquium held on May 4, 1989, at the University of Toronto. Special thanks go to Michael Trebilcock for bringing together an impressive collection of contributors, and to Pia Bruni for her administrative support. The study was edited and prepared for publication by Barry Norris.

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Thomas E. Kierans
President

A Level Playing Field: Toward a Canada-U.S. Trade Law

Robert C. York

Introduction

Trade and investment increased dramatically in the 1980s as a result of innovations in information transfer and technology and the globalization of capital and many product markets. This trend is likely to continue into the 1990s. At the same time, countries are becoming increasingly interdependent, both economically and politically.

Because of these trends, mechanisms to resolve international trade disputes are becoming more judicial in nature, often including provisions for third-party arbitration and adjudication. The need for more detailed trade rules and trade remedy laws is motivated by the desire to transfer the resolution of trade disputes from the realm of politics to a technocratic process in which objective judgments, unswayed by domestic political influence, are the norm. This is the essence of the dispute settlement mechanisms contained in the Canada-U.S. Free Trade Agreement.

This desire for more legalistic ways to resolve trade disputes has also been influenced in many countries by the increasing role of market forces in the allocation of resources. At the same time, however, governments have not entirely relinquished their active support of domestic industries, with the result that fierce competition between domestic and foreign firms often turns into disputes between countries. The widespread use of trade remedy laws in the 1980s makes it abundantly clear that the current system of trade laws no longer adequately serves a globalized economy. A revised system is necessary — one that is effective in resolving complex disputes quickly and fairly, and that reduces the temptation for any country to act unilaterally and outside the system.

The contributors to this study assess critically the failings of the international trade law regime and offer some bold suggestions as to how the system can be reformed. This introductory chapter has a narrower focus, on the possibility of significant reform to trade remedy laws between Canada and the United States.

Trade Laws and the Canada-U.S. Free Trade Agreement

Most economists would argue that the Canada-U.S. Free Trade Agreement is a significant accomplishment. It has created virtually free trade in goods and services, liberalized investment, and introduced quite novel mechanisms for resolving trade disputes in the world's largest trading partnership. Unfortunately, however, the Agreement failed to provide for a common set of international trade remedy laws. Instead, it calls for a five-to-seven year period in which a new set of laws is to be negotiated that will replace each country's domestic trade laws. This will be no easy task.

Until a new system of Canada-U.S. trade laws is established, the Agreement includes temporary arrangements regarding countervailing duties and antidumping measures.[1] This mechanism is designed to prevent either country from acting unilaterally in interpreting the current set of trade rules and the provisions of the Agreement, and to ensure that disputes can be resolved in an impartial and reasonably expeditious manner. Fairness — or what is often referred to as a "level playing field" — is to be achieved through the review of domestic countervailing duty and antidumping decisions by a binational panel, rather than by the domestic courts of the country taking the action as was the procedure under the old system.

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[1] For details, see Richard G. Lipsey and Robert C. York, *Evaluating the Free Trade Deal: A Guided Tour through the Canada-U.S. Agreement*, Policy Study 6 (Toronto: C.D. Howe Institute, 1988).

From the point of view of Canada, this review mechanism should prevent some of the perceived misuses of trade remedy laws by the United States.[2] Moreover, this kind of judicial review will make determinations of injury and causality in these cases more transparent and the process more accountable. In short, judicial review should improve the process and, in the end, improve the decisions brought down by the U.S. trade authorities. So far, the new mechanism has been well received in both countries. It has resulted in uncompromising and expeditious decisions of high quality. For many observers, however, a truly level playing field awaits the negotiation of a permanent set of arrangements.

Canada's strategy for negotiating a new set of trade laws with the United States involves two steps. The first is to extract as many trade law reforms as possible from the current, Uruguay Round of multilateral trade negotiations under the General Agreement on Tariffs and Trade (GATT). The second step is to engage the U.S. side directly, and to bargain hard for a successful outcome using as a starting point whatever reforms are achieved through the GATT.

At the GATT talks in Geneva, Canada's trade law goal is incremental reform, not a complete overhaul of the system. Canadian negotiators would like to see improved multilateral rules governing subsidy and countervailing duty practices, as well as the use of safeguard measures. The GATT negotiations are scheduled to end in December 1990, so little time remains.

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[2] To date, there have been 11 requests for binational panel reviews of antidumping and countervailing duty decisions, all but one of which have been initiated by Canadian interests. Cases that have been sent to panel review include those involving raspberries, replacement parts for paving equipment, salted codfish, pork, steel rails, and induction motors.

Shortly after the multilateral talks end, Canada must engage the United States if a successful outcome to Canada-U.S. trade law reform is to be expected. One reason for the need for urgency is that the U.S. president's authority to negotiate the reform — the so-called fast track — will expire in 1992; it would be wise to have a substantial agreement in place by that time, otherwise the results of the negotiations will be subject to amendment by the U.S. Congress.[3]

Another reason for urgency is that the United States is still very much inclined to blame its continuing trade imbalance and loss of international competitiveness on what it perceives as unfair trade practices. In the view of many Americans, these practices exist everywhere but in the United States. This could make it difficult for Canada to bargain with the United States, and the difficulty is likely to increase if the U.S. trade imbalance does not decline. Many observers believe that this trade imbalance may continue for a long time, since, they think it is rooted in the low U.S. savings rate, not in trade *per se*. Businesses in the United States may also pressure the U.S. government to provide a quick fix for their lack of international competitiveness, which could lead to the greater use of pro-active innovation policies rather than a reliance on market adjustments — for example, a realignment of U.S. exchange rates — to eliminate the trade imbalance.

A Canada-U.S. Antidumping Code?

"Dumping" is the term used to describe the price-discriminatory or predatory practices of foreign exporters in selling their goods in international markets below home market prices or below the cost of their production. Within a national market and for domestically produced goods, such perceived "unfair" pricing practices would fall under the purview of domestic antitrust or competition laws. It might be argued, therefore, that within a single integrated market created by the Free Trade Agreement, there is little reason why Canada and the United States need to negotiate an antidumping law — that is, a law designed to police crossborder trade.

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[3] The president's fast-track negotiating authority means that, once an agreement is struck, Congress can only vote to accept or reject, but not to amend, the legislation.

Dumping — or, rather, unfair pricing practices — could be dealt with efficiently and effectively through domestic competition laws. In Canada, such laws could be applied equally to Canadian and U.S. firms selling in the Canadian market. In the United States, antitrust laws could be applied equally to U.S. and Canadian firms operating in the United States. Since antidumping laws are directed against private business practices, an alternative to the existing regime — one that allows for reciprocal enforcement of competition laws against price discrimination and predation — seems a reasonable and fairly straightforward issue to negotiate, in theory.

But theory and practice do not always coincide, and the development of a Canada-U.S. antidumping code is likely to present a considerable challenge. As Sylvia Ostry recently noted, antidumping is "today's weapon of choice," and it is used far more extensively in defensive world trade actions than are countervailing duties.[4] In Ostry's view, the problems with reforming antidumping practices are rooted in the institutional mechanisms designed to counter dumping and the perception that countries have of the scope for change:

> The trade remedy laws are triggered by industry and administered by the government bureaucracy...[T]hey are extremely complex and technical; in the United States and, increasingly, in the [European Community], their use requires the participation of highly sophisticated lawyers. A built-in momentum drives their rising frequency, as learning by doing

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[4] For details on the use of the trade actions, see the paper by Andrew Anderson and Alan M. Rugman in this volume.

> generates more procedural expertise on the part of lawyers and more information by business on the opportunities the regulations afford. The countervalence, which might be provided by consumers or users, is largely absent, not only from the administrative process, but also in political terms, since the procedures are often so tortuously technical as to be virtually incomprehensible to most of the news media.[5]

Ostry is, therefore, skeptical about applying, in a multilateral context, the straightforward extension of domestic competition laws — or the use of national treatment, which is the same thing — to replace international laws on dumping, for two reasons:

- antidumping laws are used most frequently to protect domestic firms in strategic sectors that have large, positive effects on other areas of the economy, so governments will be unwilling to give them up; and
- the application of domestic competition policy would lead to wide discrepancies, since these laws differ markedly between countries.[6]

The GATT is now dealing with the issue of antidumping. On the table in Geneva are suggestions to constrain unilateral moves and interpretations of the GATT dumping code that have lead to the proliferation of antidumping actions. Discussion will focus on substantive and procedural changes to the code in areas such as rules of origin, disclosure of information in dumping cases, and the determination of dumped margins. Thus, any success in the multilateral talks should provide the foundations for the Canada-U.S. discussions. And even though multilateral reform will prove difficult, Canadian and U.S. competition laws are, at least, quite similar, which should help to reduce obstacles to a bilateral arrangement.

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[5] Sylvia Ostry, *Governments and Corporations in a Shrinking World: Trade and Innovative Policies in the United States, Europe and Japan* (New York: Council on Foreign Relations, 1990), p. 41.

[6] Ibid., p. 91.

A Canada-U.S. Subsidies Code?

Canada-U.S. subsidy negotiations will also be difficult, as they involve issues of fair treatment — national treatment and reciprocity. They are also complicated by the fact that constraints on subsidies impinge on what many believe to be at the core of national sovereignty and the role of government in modern society. Yet, it is in the interest of both countries to develop a mutually beneficial subsidies code to constrain the use of practices that give producers in one country an unfair advantage over producers in the other, and that distort trade patterns and the allocation of resources. A subsidies code would also curb the use of countervail laws to harass and disrupt the flow of commerce. Both sides should welcome a regime that reduces the need for trade remedies, since domestic protection often amounts to shooting oneself in the foot — more often than not, countervailing duties also hurt the country that imposes them.

Subsidies negotiations will be complicated, however, by the fact that no international consensus exists on what constitutes unfair government support to industry. This has allowed each country to interpret and implement trade laws in its own way. The search for a solution to this problem lies at the heart of the Canada-U.S. — and, indeed, the international — trade remedy reforms.

The Free Trade Agreement allows for the negotiation of a Canada-U.S. subsidies code over period that ends in 1995. The code would replace the temporary dispute settlement provisions in Chapter 19 of the Agreement relating to the use of countervailing duties. The negotiators were unable to include a subsidies code in the Agreement itself because of the emotional and divisive debate that the issue sparked on the Canadian side of the border, and because of the unwillingness or inability of either country to table a politically acceptable position. There were a number of reasons for this:

- Many Canadians feared that regional development and social programs might be attacked as unfair subsidies. In practice, however, a subsidies code may prove to be the best way to protect Canadian sovereignty in these areas.
- Ironically, the United States also believed that a subsidies code would be a threat to its sovereignty because of its worldwide economic interests and the uncertain precedent that such a code could have set.
- Many Americans — including some U.S. trade negotiators — perceived that while Canadian governments subsidize industry, U.S governments do not. Accordingly, they felt that the threat to security of market access from countervail laws was a Canadian problem, not a U.S. one.
- The United States relies on trade remedy laws, especially countervailing duties, to a far greater degree than does Canada. While the Free Trade Agreement was being negotiated, Congress was pushing for stronger U.S. trade laws. This made the issue of security of access — and relief from administered U.S. protection — a difficult one to reconcile.

During the initial free trade negotiations, Canada pushed for a subsidies code that would classify such practices as one of three kinds:

- "red light" or prohibited subsidies, which, if used, would justify a countervailing duty action;
- "yellow light" or actionable subsidies, the use of which might justify a countervail action; and
- "green light" or nonactionable subsidies, which would be expressly permitted.

The United States rejected this "traffic-light" approach during the bilateral talks, but has since been willing to proceed under this framework in the GATT negotiations. If this approach is successful in the multilateral forum, it could be reintroduced in any new set of Canada-U.S. negotiations on a subsidies code.

The GATT negotiations and the bilateral process are particularly important in the case of agricultural subsidies. More than half of the United States' countervail cases against Canada — and Canada's one countervail case against the United States — concerned agriculture. Under the Free Trade Agreement, the two countries have left resolution of the difficult agricultural issues first to the multilateral negotiations — since agricultural subsidies and trade barriers of third countries are important — and a second iteration to the bilateral subsidies negotiations. Delaying the bilateral negotiations until after the end of the Uruguay Round also allows time for both sides to research the issues and establish a quantitatively better position from which to bargain.

It's Canada's Move

The agricultural subsidies issue reflects Canada's strategy of building on the blocks laid by the Uruguay Round. But how can Canada make this strategy operational? In other words, what can Canada do in the period before the tough negotiations with the United States begin?

The United States will bargain from the position that Canada's concerns about countervail can be addressed by eliminating or at least reducing Canadian subsidization. Canada will take the view that the United States subsidizes, but in more subtle ways — for example, through the tax system and government procurement policies — and that countervail is a larger problem for Canada since countervail threatens Canadian producers more than it threatens U.S. ones.

As Andrew Anderson and Alan Rugman demonstrate later in this volume, the United States uses countervailing duties far more often than do other countries. It therefore comes as no surprise that many Americans believe the United States does not subsidize. A major obstacle for Canada to overcome will be to convince Americans that they, too, are sinners, and to educate them on the extent to which their government does subsidize. Each government uses different strategies to support business in their country. Canadian subsidy practices simply tend to be more transparent.

There seems no doubt, then, that Canada must persuade the United States to negotiate seriously. If the United States was really serious about levelling the trade playing field, it would not resist negotiations to restrict countervailing duties on a net basis — that is, only on the difference between the support given to foreign and domestic producers of any particular industry.

There are two possible explanations for this U.S. resistance: either the difference between net and gross is negligible because U.S. businesses do not receive support, or the use of a gross approach acts as a nontariff barrier that inhibits foreign exports.

So, what course of action can Canada take to create incentives for the United States to bargain seriously? Some trade policy experts and trade lawyers feel the way to do this is by initiating a series of countervail cases against it. A highly political example would serve the purpose: the United States complains about Canadian support programs to farmers — most recently in the pork industry. Why not pursue these issues with the United States as it does with Canada? No country has ever challenged the United States aggressively on its subsidy practices.[7] Another possible procedure would be to undertake counteractions whenever the United States files a questionable case. This could act as a check on U.S. actions and decisions, and may induce U.S. negotiators and political authorities to perceive more clearly the reciprocal nature of the subsidies issue.

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[7] This is demonstrated clearly in a recent analysis by Alan M. Rugman and Samuel Porteus, "Canadian and U.S. Unfair Trade Laws: A Comparison of Their Legal and Administrative Structures," *Canadian Business Law Journal* 16 (December 1989).

The negotiations will be highly charged and very difficult if either side adopts an adversarial approach. But in order for success to be achieved, a bridge must be built between the attitudes of business and government in each country on the fair usage of trade remedy laws. The Canadian government does not send out strong signals to the business community that it is interested in pursuing trade matters that are perceived to be unfair, so business does not push hard. The U.S. government urges business to use the mechanisms that are available to them, and so business does. Canada's reluctance to pursue countervail actions aggressively against the United States stems from the belief that it cannot challenge the United States on subsidy practices in which it also engages. This may be a sensible attitude, but it is not followed by the United States.

If no agreement can be reached, either side can terminate the treaty on six months' notice. Alternatively, and more realistically, the failure of the negotiations would mean that the temporary dispute settlement mechanism, like so many other temporary arrangements, would evolve into a permanent institution. Either of these outcomes would be less than optimal, since they would leave Canada without the security of access to the U.S. market that was a major motivation for the Free Trade Agreement.

Toward a Canada-U.S. Trade Law

The emergence of imbalances in world trade in the 1980s, especially between the United States and the countries of the Pacific Rim, has created great tensions in international trade relations. Allegations of unfair trade practices are now commonplace around the trading world. These practices involve principally, but not exclusively, government support for domestic exports and the predatory pricing of foreign companies in the home market. As a consequence, many countries have now sought refuge behind international trade laws designed to protect domestic industry from such practices. However, the increasing and now widespread use of trade remedies — import duties — has been ineffective in levelling the playing field. Indeed, these remedies have become a barrier to fair trade. Domestic businesses in the import-competing sector of many countries are now pushing the use of these laws to limit foreign competition.

Allegations of unfair trade practices have also been heard across the Canada-U.S. border, and have also come under intense political and public scrutiny in light of the Free Trade Agreement. The implementation of the Agreement has not curtailed the use of trade remedy laws by either country, and many of the Agreement's Canadian critics thus argue that it left Canada without the cherished goal of secure access to the U.S. market. Instead, the Agreement provided for a temporary mechanism to police the use of countervailing and antidumping duty actions. The adoption of more permanent arrangements, possibly in the form of a binational code of conduct, awaits future negotiations.

These negotiations will not be easy. The two countries should, however, find some common ground for reconciling antidumping measures. One way to approach reform would be to extend the reach of national treatment to domestic antitrust and competition laws in each country. Since these laws are quite similar, this could be a fruitful way to proceed. A more ambitious route would be the negotiation of a binational competition policy.

A binational code to govern the use of subsidies and countervailing duty measures will no doubt prove more difficult to negotiate. In Canada, opposition will come from those who fear that regional development subsidies and support for social programs will be at stake. In the United States, opposition will come from those who believe that security of market access is not their problem, because Canadian governments subsidize and U.S. governments do not. A traffic-light approach to grouping subsidies may be one way to make progress in closing the gap between each country's attitudes toward the use of fair trade laws.

Outline of the Study

In the papers that follow, prominent trade law experts point the way back to a more orderly use of international trade remedy laws and to their much needed improvement. The study is divided into two parts.

Part I provides details of the international experience with the use of trade laws. Sylvia Ostry focuses on antidumping actions. She suggests that the issue will remain a difficult one to resolve because it entails the harmonization of domestic policies and the likely need for a supranational authority.

Ronald Cass and Warren Schwartz explore the hypothesis that opinions of the United States International Trade Commission do not follow a judicial model. They observe that while commissioners' decisions on trade remedy matters meet the technical considerations of the legal statutes, they remain sufficiently opaque to be swayed by political concerns.

Patrick Messerlin provides keen insights on the use of antidumping measures as a strategic trade policy device for corporations in the European Community, and criticizes the Community for allowing the evolution of antidumping rules to become "a constantly expanding instrument biased to protection." He also fears that social welfare is being adversely affected as corporations have used the rules to foster collusive behavior and to strengthen cartels. Messerlin concludes that this "privatization" of the antidumping laws is having a negative effect on the GATT, and is contributing to the Community's reluctance to eliminate the protectionist drift that is now occurring.

In the final paper of Part I, Andrew Anderson and Alan Rugman investigate the empirical linkage between the use of countervailing and antidumping duties and the balance of trade, in an attempt to establish a country-factor bias in the use of these actions. They conclude that only in the United States can a bias be found.

Part II focuses on ways to reform trade remedy and safeguard laws. Alan Sykes suggests a two-pronged approach to the reform of the injury test in global safeguard actions. He prefers that injury to domestic industry be judged not by a surge in imports but by a serious dislocation in the labor market. But he would not allow a safeguard action if the dislocation is due to downturns in the business cycle or as a result of increased costs to domestic producers. In this way, Sykes argues, the political rewards to actions increases and, more importantly, so do the economic rationales.

In the final paper, Michael Trebilcock explains how a system of international trade remedy laws would look in a first-best world. His discussion is based on the notion that the reliance and use of trade remedies is a less than ideal approach, and he argues that it is in the interest of every trading nation to undertake badly needed reform of trade remedy laws.

PART I

The International Experience with Trade Remedy Laws

Antidumping: The Tip of the Iceberg

Sylvia Ostry

During the 1980s, antidumping became the weapon of choice to deal with "unfair" trade. Among the four big users — Australia, Canada, the European Community (EC), and the United States — actions taken under antidumping procedures increased from a total of just under 60 in 1981 to nearly 800 in 1989. By the end of the decade, antidumping legislation had been adopted by 28 countries, including many developing countries. Since antidumping action, uniquely among trade remedy laws, is triggered by and targeted at the private sector, one could say that the 1980s was the decade of the privatization of trade policy. As in all dynamic private markets, there was a process of learning by doing, of discovering the unique potential in an instrument that could be used to hone in on an individual exporter of specific products in particular countries. Compared to this superbly customized weapon, safeguards are a crude blunderbuss.

Apart from this built-in acceleration momentum, what other factors account for the takeoff of antidumping in the 1980s? One would need detailed analyses of each country to answer that question, but some general background developments in the international economy created powerful pressures to increase the demand for and supply of antidumping action. Among these I would include the deep global recession, commodity price collapse, and debt crisis at the beginning of the decade, and the wide exchange-rate swings during the mid-1980s. More fundamental was the trend toward increasing internationalization of production in technologically sophisticated manufacturing industries dominated by large firms, for whom economies of scale, heavy research and development costs, dynamic learning advantages, and global networking formed the basic parameters of international competition. These fundamental changes in the international trading environment have at least two implications for antidumping action. On the demand side, in such oligopolistic industries, trade policy becomes a promising element of corporate strategy. In some cases, changes in the policy environment in the 1980s that focused on the struggle over competitiveness in so-called strategic industries served to produce a matching increase in supply through changes in antidumping regulation or procedures. On the other side of the coin, the advances in manufacturing methods and the globalization of production allowed firms to develop means to duck or pre-empt dumping measures, a factor which also led to increased government supply to match rising corporate demand.

One consequence of the antidumping takeoff in the 1980s has been that, as the Uruguay Round of multilateral negotiations under the General Agreement on Tariffs and Trade (GATT) draws to a close in 1990 — contrary to expectations at the launch of the Round in 1986, when antidumping was scarcely mentioned as an issue — the reform of antidumping has become both very important and extremely contentious. Countries and industries are lined up on both sides of every item in a possible reform package. At this stage, the outlook for the outcome in December 1990 is highly uncertain. Some experts close to the Geneva negotiations are moderately hopeful of the achievement of both procedural and substantive updates to the code, and constraint of the tendency to unilateral expansion and elaboration so apparent at the end of the 1980s — especially, but not only in the EC. Since the devil is in the detail in antidumping regulation and procedure, only a trade lawyer can read the lengthy submissions now in play and detect the profile of a possible compromise. Since many of those lawyers are present at this conference, I will exploit the comparative advantage of an economist: let us assume a favorable outcome for the Uruguay Round and, in particular, a reform of the antidumping code that effectively constrains its abuse as a protectionist weapon.

Let me add that another condition for effective antidumping reform in the Uruguay Round would be a new safeguard arrangement; antidumping became a thinly disguised selective safeguard protection against increased imports in many competitive sectors during the 1980s.

Once again, as in the Tokyo Round, the sticky point regarding safeguards has been the EC's demand for selective application. It seems better to face this head on, since no matter what fudged language produces agreement, the EC will continue to use some form of selective arrangement.

One way around this conundrum is to include selectivity as part of a "menu of options" in a revised safeguard clause. But in order to constrain its use, different "prices" should be charged for each item on the menu. Thus, for example, if the most desirable option is protection by tariff on a most-favored nation basis, the price should be very low: limited compensation combined with a gradual reduction of the tariff over a specified time period. Selective protection, by quantitative restriction, preferably negotiated by the importing and exporting country, should be the most "expensive": substantial compensation and significant reduction of the quotas over a relatively short time period. Other combinations could obviously be added to the menu. A surveillance mechanism geared to monitoring the adjustment of the protected industry and publicizing voluntary export restraints negotiated outside the GATT safeguard arrangement would also be desirable. Second or third helpings of any item on the menu should carry a very high price tag. After all, the Multifibre Arrangement has lasted for over 25 years, and consumers have carried a hefty charge.

But to return to antidumping and oligopolistic industries, I would argue that whatever reform is achieved in the Uruguay Round, fundamental pressures now apparent in the international economy require a radically different approach to the antidumping issue. Reform in the Round is the tip of the iceberg. As I have argued elsewhere:

> Logically, the principle of national treatment under domestic competition policy should replace antidumping regulation. The same definition of undesirable pricing behaviour that is applied to domestic firms should apply to foreign firms exporting into the domestic market.[1]

A necessary condition for this radical reform, however, would be a prior commitment to harmonize competition policy that differs significantly from country to country in both content and enforcement. Moreover, as an increasing number of experts would assert, there may be a need to go one step further than harmonization, and institute a supranational competition authority not only to deal effectively with disputes, but to handle transnational issues. Let me elaborate a little on the reasoning behind these proposals. This is best illustrated by three developments in the 1980s.

The first is the U.S.-Japanese semiconductor trade agreement (STA) of 1986, which followed a series of legal actions on dumping initiated by U.S. semiconductor firms. The agreement set minimum prices for Japanese exports and required Japan to boost the market share of foreign firms to 20 percent. The STA was important in a number of respects. It was the first example of bilateral results-oriented managed trade in a "strategic" sector — undefined but loosely used to indicate significant technological externalities or spillovers. The specified market share, it should be noted, related to foreign-owned companies, not to U.S. exports. This seems to dilute the externalities rationale, and suggests that the real issue was the use by the private sector of government action to capture a share of the rents enjoyed by Japanese firms in their protected home market.

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[1] Sylvia Ostry, *Governments and Corporations in a Shrinking World* (New York: Council on Foreign Relations, 1990), p. 91.

But the STA went further. As Ken Flamm of the Brookings Institution will document in a soon-to-be published study, the STA effectively cartelized the dynamic random-access memory (DRAM) semiconductor industry. A DRAM cartel is clearly threatening to the interests of U.S. users who are not vertically integrated. Moreover, Flamm's evidence suggests that one result of the STA may be Japanese market dominance in the next generation of chips — an outcome which will hardly be in the interests of the U.S. semiconductor producers or users. One problem with the privatization of public policy is that the corporate vantage point usually excludes consideration of the indirect consequences of a given strategy, often outweighing its short-run, direct impact.

The STA is an example of a peculiarly American phenomenon that has been termed "special protection." Industries that are especially powerful in a political sense may not have to settle for trade remedy laws (in this case, antidumping): they secure "special protection" through an executive branch reinforced by powerful congressional pressure. But the moral of the story — the pressure for cartelization inherent in the "capture" of trade policy by oligopolistic firms — is not uniquely American as the next example suggests.

There is a considerable body of evidence, which I and others have documented, showing that the EC has used antidumping as an instrument of industrial policy especially in the information technology sector.[2] European firms have organized an Information Technology Roundtable, which works closely with the Commission. The main target of the policy is Japan, although some U.S. firms have been sideswiped in the process.

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[2] Ibid., pp. 46–52.

Once again, as in the STA, EC antidumping actions have engendered powerful cartelization propensities, as Patrick Messerlin has pointed out. The same effect is likely to result from the semiconductor pricing agreement negotiated with Japan, which set floor prices not only for 256 kilobit and one megabit DRAM chips, but also the next generations of 4 and 16 megabit chips! The impact on European user industries is likely to be seriously damaging.

As these two examples illustrate, not only is there a basic conflict between trade policy and competition policy — something Jan Tumlir pointed out many times in the past — but that today, conflict is more threatening in the context of a more integrated world economy increasingly dominated by global corporations.

Finally, corporate networking, another high-profile trend of the 1980s, also raises questions concerning competition policy. This trend has been christened "technoglobalism," because a major factor propelling new forms of technical cooperation — joint ventures, technical agreements, research consortia like the U.S. Sematech or the EC's Jessi — has been the need to tap into technical advances quickly and effectively throughout the world to maintain competitiveness. Technical networking is becoming an essential component of corporate strategy for market access.

But, as many case studies suggest, networking involves a delicate balance between competition and cooperation. The explosion of networking in recent years raises a number of questions for government technology policy that are being analyzed by the Organisation for Economic Co-operation and Development. But since technology access today is as important as market access and clearly in an increasing number of sectors the two are inextricably linked, it seems reasonable to raise a concern about market dominance and therefore about competition policy. While harmonization of national policies would be a positive step, the need for some supranational authority to handle transnational issues may become more pressing. In the absence of such an authority, one should expect major extraterritorial incursions from both the United States and the EC. In this regard, a recent article in the *New York Times* reported that "the United States is considering a significant extension of antitrust laws to strike at American subsidiaries of foreign companies that are found to engage in price-fixing, the carving up of markets and other anti-competitive practices in their home markets."[3] One would be unwise to ignore this early warning signal.

In conclusion, then, I would argue that when the antidumping issue is placed in a broader context, it is essential to plan for policy action beyond the Uruguay Round. The heart of the issue concerns competition policy: the harmonization of domestic policies and an assessment of world trends that may create the need for a supranational authority. Perhaps the Canadian initiative for creating a World Trade Organization, if successful, could provide a forum for discussion of these ideas. After all, Chapter V of the Havana Charter dealt with competition policy, but only Chapter IV — the General Agreement on Tariffs and Trade — survived!

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[3] "U.S. Considers Using Antitrust Laws Against Foreign Firms," reprinted in the *International Herald Tribune*, April 17, 1990, p. 1.

Causality, Coherence, and Transparency in the Implementation of International Trade Laws

Ronald A. Cass and Warren F. Schwartz[*]

Introduction

Most discussions of legal decisions juxtapose "judicial" decisions and "political" decisions. Judicial decisions are assumed to be based on "technical" considerations that implement a framework derived from an authoritative source.[1] Such decisions are made after a formal process for presentation of evidence on and argument about the particular considerations relevant to dispute within the given legal framework and are announced in written opinions. Political decisions are associated with legislative action. At the extreme, they are assumed to be based on some congeries of factors not circumscribed by a formally governing law and not limited to a discrete evidentiary record. Political decisions do not always produce written justification, although they may.

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[*] The views presented in this paper are those of the authors and do not necessarily represent the views of the U.S. International Trade Commission. The authors have received helpful comments from Richard Boltuck, Robert Feinberg, Seth Kaplan, Jerry Mashaw, Stephen Narkin, Edward Schwartz, and Kenneth Shepsle.

[1] As we discuss below, the distinction of "technical" from "political" considerations does not separate concerns that have no political dimension from concerns that do. The distinction, rather, is between matters as to which there has been some *ex ante* authoritative prescription and matters left to *ad hoc* decisions generally free from express formal constraints.

Typically, administrative decisions lie between the poles of true judicial and true legislative-political decisions, but are assimilated to one or the other. Decisions made through processes that look more court-like are labeled "quasi-judicial," while other formal decisions are "quasi-legislative."[2]

Administration of international trade laws in the United States looks at first blush as if it were divided into political and judicial spheres. One set of decisions, involving matters such as negotiating positions to be taken in discussions with other governments, is made by the United States Trade Representative under fairly loose legal guidelines without any formal procedure, and is not announced in any formal manner. The other set of decisions, contingent on satisfaction of more constraining legal guidelines, is made by the United States International Trade Commission (ITC) through processes that involve many — but not all — of the attributes of judicial procedures, is tied to a written record, and is announced in written opinions.

Unlike most other judicial-appearing administrative processes, administration of contingent trade remedy laws by the ITC, like the administration of international trade laws by other national government bodies, often is asserted to reflect raw political judgments, with trade protection granted to politically influential claimants. Other commentators view ITC decisions as simple applications of relatively technical judgments, functionally equivalent to law application by judges under previously articulated legal guidelines. Efforts to assess these competing claims empirically through correlation of decisional outcomes with political and technical variables have produced mixed results.[3]

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[2] A broad category of decisions made without any formal process are referred to as "informal" administrative decisions.

[3] For early efforts to assess the relative degree of technical and political factors in the outcome of injury determinations in antidumping and countervailing duty cases at the ITC, see J.M. Finger, H. Keith Hall, and...

We do not directly engage this debate, but address one issue that has entered the debate as evidence of the sort of decisions rendered by trade adjudicating bodies such as the ITC. Our focus is the nature of the opinions that announce ITC decisions, rather than the decisions themselves. This paper seeks to provide a positive explanation for the observed quality of ITC opinions in contingent trade remedy cases, specifically those written in antidumping and countervailing duty (subsidy) investigations.

Our initial observation is that these decisions do not conform closely in several respects to generally accepted criteria for judicial decisions. The most important of these criteria, which jointly comprise what we will refer to as the "judicial model," is that a decision should clearly articulate the reasons that actually influenced the judge's or administrator's decision. Obfuscation of these reasons is a defect in an opinion, and intentional obfuscation is an illegitimate exercise of authority. The reasons underlying opinions, moreover, should be amenable to principled articulation, providing an explanation that is coherent — that intelligibly supports the result — that illuminates differences with other decisions, and that correctly applies the governing law.

This model of opinions, while not expressly addressing the substance of the decisions announced, is premised on the belief that the explicit identification and coherent articulation of what "really matters" contributes significantly to the production of

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...Douglas R. Nelson, "The Political Economy of Administered Protection," *American Economic Review* 72 (June 1982); and Robert E. Baldwin, *The Political Economy of U.S. Import Policy* (Cambridge, Mass.: MIT Press, 1985). A recent effort in the same vein is Michael Moore, "Rules or Politics? An Empirical Analysis of ITC Antidumping Decisions" (George Washington University, January 1990, Mimeographed). See also Arye L. Hillman, *The Political Economy of Protection* (New York: Harwood Academic Publishers, 1989), for a more general survey of the literature. For a readable short essay on the current state of the economic theory, see Robert E. Baldwin, "The Political Economy of Trade Policy," *Journal of Economic Perspectives* 3 (Fall 1989).

good outcomes. Adherence to this judicial model in a body of related opinions should promote decisional outcomes that are legally correct, consistent, and sufficiently predictable to allow people to adapt to the controlling rules.

The hypothesis developed in this paper is that systematic production by trade administrators of opinions that are less clear and coherent than model judicial opinions does not reflect incompetence, but instead suggests at least a partial rejection of the judicial model by the ITC. ITC opinions, in other words, do not conform well to the judicial model because the commissioners believe that their opinions should not conform very well to it. That rejection evidences a belief that the decision being made should not be constrained by formal legal guidelines to the same extent as judicial decisions. What is more problematic is determining why these beliefs are held and whether they accurately describe the governing legal regime, which provides numerous indications that the Commission is expected to follow the judicial model but also, in less formal ways, contains indications that unstated political considerations may be expected to have some influence.

We first discuss the ITC's opinions and their departure from the judicial model. Our aim is to lay the requisite foundation for our positive analysis by demonstrating that observed deviations from the judicial model are not episodic and unsystematic. We then try to account for the observed departure. We examine both a cynical explanation for behavior of government officials, and an alternative explanation grounded in difficulties of articulation of congressional interests and of assuring administrative fidelity to those interests. Each explanation is partly congruent with what we observe, but neither provides a strong positive explanation for the observed deviation from the judicial model.

Decisionmaking at the ITC

We focus on the decisions of the United States International Trade Commission under two contingent trade remedy laws of the United States, antidumping investigations and subsidy — countervailing duty — investigations. Both types of proceeding are governed by essentially the same legal standards, and for practical purposes they form a single part of the Commission's operations.[4] The ITC also administers two other contingent trade remedy laws through unfair trade practices (Section 337) investigations and escape-clause investigations. We briefly discuss decisions under these laws at the conclusion of this part of the paper.

Antidumping and Subsidy Injury Determinations: The Legal Framework

On its face, the governing legal regime appears intended to produce decisions in accord with the judicial model. The statute that governs ITC dumping and subsidy decisions, Title VII of the *Tariff Act of 1930*,[5] contains fairly detailed instructions of the factors to be considered by the Commission in determining the effects of suspect trade practices. Moreover, the ITC is directed to explain how it evaluated the statutory factors, what other factors influenced its decision, and how those factors affected disposition of each investigation. The law also makes these decisions of the ITC subject to judicial review.

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[4] Both antidumping investigations and subsidy investigations are governed by Title VII of the *Tariff Act of 1930*, as amended, and generally are treated as analytically indistinguishable by the Commission. The merger of these two areas of inquiry predates legislation requiring the Commission to consider jointly the effects of dumping and subsidies on a single U.S. industry.

[5] 19 U.S.C., Sections 1671 *et seq.*

All of these suggest an expectation that ITC decisions should conform to the judicial model.

Title VII expressly implements, and generally accords closely with, the Antidumping Code of the General Agreement on Tariffs and Trade (GATT). It provides for administrative determination of the existence of dumping, principally defined as sales to the United States at a price below that charged in the exporting country,[6] and of the effect of dumping on producers of similar competing products in the United States. The existence of dumping — and its magnitude, referred to as the "margin of dumping" — is determined by the U.S. Department of Commerce. The effect of the dumping is assessed by the ITC. Only if the ITC determines that dumping has caused "material injury" to the relevant domestic producers will antidumping duties be assessed.[7]

Subsidy or countervailing duty (CVD) law is also governed by Title VII, which in relevant part implements the GATT Subsidies Code.[8] As with dumping, the Department of Commerce determines the existence and amount of a countervailable foreign subsidy, and the ITC determines whether the subsidy has caused material injury to the domestic producers.[9] The definition of a countervailable subsidy is complex and has been the subject of some controversy.[10] For our purposes, it is sufficient to note that, like dumping, subsidization is objectionable because it can reduce the price of products imported into the United States, although that is not an essential element in their definition under U.S. law.[11] Unless the ITC finds that foreign subsidies have materially injured domestic producers, no countervailing duty will be imposed.[12]

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[6] 19 U.S.C., Sections 1673, 1677a, 1677b.

[7] 19 U.S.C., Section 1673.

[8] S. Rep. No. 249, 96th Cong., 1st Sess. 57, 87 (1979); H.R. Rep. No. 317, 96th Cong., 1st Sess. 49 (1979); *Algoma Steel Corp. v. United States*, 688 F. Supp. 639, n. 6 (Ct. Int'l Trade 1988), *aff'd*, 865 F.2d 240 (Fed. Cir. 1989).

[9] 19 U.S.C., section 1671.

[10] See Ronald A. Cass, "Trade Subsidy Law: Can a Foolish Inconsistency Be Good Enough for Government Work?," *Law and Policy in International Business* 21 (forthcoming, 1990); Richard Diamond, "Economic Foundations of Countervailing Duty Law," *Virginia Journal of International Law* 29 (1989); idem, "A Search for Economic and Financial Principles in the Administration of U.S. Countervailing Duty Law," *Law and Policy in International Business* 21 (forthcoming, 1990); Charles J. Goetz, Lloyd Granet, and Warren F. Schwartz, "The Meaning of 'Subsidy' and 'Injury'...

The provisions of Title VII that frame this material-injury inquiry suggest four analytical questions for the ITC. These are essentially the same questions one would identify as necessary to resolve a dispute over the causation of injury in the absence of a statutory framework: in short, they ask who, how, what, and how much? First, while the law is plainly designed to protect domestic producers against the effects of pricing practices that reduce the prices of imports that compete with domestically produced goods, the Commission must in each case identify the discrete set of producers relevant to that case. It must, in other words, decide the question, effects *on whom* — material injury to whom. Second, the Commission must decide *how* the objectionable activity affected the domestic producers; how, in other words, to analyze the causal link between the "unfair trade practice" — dumping or subsidy — and the injury to domestic producers. Third, the ITC must specify *what kinds* of effects constitute "injury." Finally, the Commission must determine *how much* injury is necessary to

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...in the Countervailing Duty Law, *International Review of Law and Economics* 6 (1986); and Alan Sykes, "Countervailing Duty Law: An Economic Perspective," *Columbia Law Review* 89 (1989).

[11] See Cass, "Trade Subsidy Law"; and Goetz, Granet, and Schwartz, "The Meaning of 'Subsidy'."

[12] An ITC finding of injury is required in the great majority of cases, but is not required for imports from countries that are not signatories to the Subsidies Code, are not governed by "substantially equivalent" obligations, and are not otherwise entitled to unconditional most-favored-nation treatment for the goods at issue. 19 U.S.C., Section 1671(a), (b).

be "material." Title VII does not resolve any of these questions precisely, but suggests answers to each of them.

Resolving the Issues: A Roadmap to Title VII Decisions

Sketched below is a set of answers to the four questions that must be resolved to specify the effects of dumping. The answers frame a counterfactual inquiry, comparing one state of the world with another to reveal the effects of the critical causal agent — dumping or subsidization — that both conforms to the governing law and provides a coherent basis for resolution of the issues before the Commission.[13]

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[13] The analysis presented here does not fully expose all the legal arguments over construction of Title VII. For example, one issue that has divided ITC commissioners recently is the analytical predicate for their investigations: what is it that the effects of which are to be analyzed? On this and other issues, we recognize that others may disagree. All of these points have been dealt with elsewhere, and we will not recapitulate those discussions here.

For more than ample discussion of these issues, see, for example, *Certain Telephone Systems and Subassemblies Thereof from Japan and Taiwan*, USITC Pub. 2237, Ins. Nos. 731-TA-426 and 427 (Final)(Nov. 1989) (Dissenting Views of Vice Chairman Cass), referred to hereafter as *Telephones I*; *New Steel Rails from Canada*, USITC Pub. 2217, Inv. Nos. 701-TA-297 and 731-TA-422 (Final)(Sep. 1989) (Dissenting Views of Vice Chairman Cass), referred to hereafter as *New Steel Rails*; *Digital Readout Systems and Subassemblies Thereof from Japan*, USITC Pub. 2150, Inv. No. 731-TA-390 (Final)(Jan. 1989) (Concurring and Dissenting Views of Commissioner Cass), referred to hereafter as *DROs*; *Granular Polytetrafluoroethylene Resin from Japan and the Netherlands*, USITC Pub. 2112, Inv. Nos. 731-TA-385 and 386 (Final)(Aug. 1988) (Additional Views of Commissioner Cass), referred to hereafter as *PTFE*; and *3.5" Microdisks and Media Therefor from Japan*, USITC Pub. 2077, Inv. No. 731-TA-389 (Preliminary)(Apr. 1988) (Additional Views of Commissioner Cass), referred to hereafter as *Microdisks I*.

We also note that while argument over the precise contours of the legal instruction contained in Title VII necessarily has implications for the exact nature of the analysis that ITC commissioners should be engaged in, few of these issues significantly affect the basic point made here respecting ITC decisions in Title VII cases.

Selecting the Subject for Injury

The first question, to whom, is presented in the statute as a direction to look for injury to the domestic industry that produces "a like product,"[14] which is defined in turn as "a product which is like, or in the absence of like, most similar in characteristics and uses with" assertedly dumped imports.[15] This instruction, despite the circularity of the like-product definition, signals that a relatively narrow classification is intended; if "most similar" is the fallback for the absence of a product "like" the imports, then like cannot describe a broad category of products. Identity would not be required, both because it is not sensible — minor variations would always prevent the existence of a like product if identity were the standard, automatically reducing every case to the search for nonidentical most similar products — and because that standard could easily have been articulated, but was not.

The reference to characteristics and uses suggests a focus on consumers' evaluations of product similarity without foreclosing the use of secondary indications of that evaluation. As the statute is designed to address effects of reduced prices for imports on domestic producers, effects that must be mediated through product competition for consumers, it makes economic sense as well to define the relevant producer class by reference to consumer judgments on products' similarity — or substitutability. Accessible measures of substitutability may be difficult to obtain where narrowly defined products are in issue, but it should be practical to define relevant indications of substitutability and to suggest the outer bounds of substitutability for like-product classes.[16]

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[14] 19 U.S.C., Section 1677(4)(A).

[15] 19 U.S.C., Section 1677(10).

[16] For a discussion of different approaches to this exercise, see *Microdisks I*, p. 349 (Additional Views of Commissioner Cass). The problems of product definition at the ITC are not quite the same as those encountered..

Tracing Effects: Causation Methodology

Although analytically this question lies at the heart of the ITC's mission, Title VII is openly agnostic on the proper methodology for tracing the effects of dumping or subsidies. The statute lists factors to be considered that must inform causal analysis, but it does not identify a method of integrating these factors into a cogent analytical structure. Indeed, the law expressly contemplates that other factors may be relevant, asking that the Commission always consider and discuss the statutorily elaborated factors and also describe the way other unlisted factors have influenced the decision.[17]

The factors specifically noted in the statute are the volume of imports subject to the dumping or countervailing duty investigation — absolute volume and volume relative to U.S. production and consumption — their effects on prices of the U.S. like product, and their impact on the industry producing the like product, including parameters such as effects on sales, return on investment, employment, compensation to employees, and research and development efforts.[18] The ITC is told to evaluate the effects of dumping or subsidies in light of the dynamics of the particular businesses involved and business cycles.[19]

Notwithstanding its devotion of considerable text to this matter, the statute suggests the proper causal analysis in just

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...in antitrust cases, largely because of the narrower market focus suggested by international trade law and the relationship of the market definition to the import prices or volumes that have been affected by dumping or subsidies. See, for example, *DROs*.

[17] 19 U.S.C., Section 1677(7)(B)(ii)(C).

[18] 19 U.S.C., Section 1677(7)(c)(iii). Other specified factors include effects on prices, output, market share, profits, cash flow, productivity, capacity utilization, inventories, employment levels, ability to raise capital, and levels of investment.

[19] 19 U.S.C., Section 1677(7)(C)(iii).

three respects. First, the analysis must take account of the listed factors, including accounting for effects of reduced-price imports in a domestic market subject to cyclical changes and unrelated business fluctuations. Second, the factors — except volume — do not list simple movements in prices or sales or profits or employment as relevant, but ask for consideration of "effects" and "impact" on such data. Third, the order of consideration moves from volume, to effect on prices, to impact on sales, investment, and employment; while not mandated, an analytical construct that proceeded in that fashion would seem in keeping with the statutory understanding.

Review of three possible approaches to causal inquiry suggests a rank order to basic analytical modes under the statutory framework. We present them in reverse order, starting with the causal methodology least suited to reveal effects of dumping or subsidies. Each at least implicitly asks a counterfactual question: How would the world be different if dumping or subsidization had not occurred? As is widely recognized in other contexts, every approach to causation requires a counterfactual with which to compare whatever circumstances can be observed,[20] but some approaches state the comparison more precisely or more usefully.

First, one might attempt the causal inquiry relying principally on description of historical facts using common undertakings to supply the causal linkages. Descriptions of facts surrounding automobile accidents — did car *A* go through the intersection before or after the traffic signal light turned red? Was car *B* going very fast or very slow? — and inferences from them by lay jurors regarding causation are examples of this approach.

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[20] See H.L.A. Hart and A. Honore, *Causation in the Law* (Oxford: Clarendon Press, 1959). See also W. Keeton et al., *Prosser and Keeton on the Law of Torts*, 5th ed. (St. Paul, Minn.: West Publishing, 1984); Guido Calabresi, "Concerning Cause and the Law of Torts: An Essay for Harry Kalven," *University of Chicago Law Review* 43 (1975); Wex Malone, "Ruminations on Cause in Fact," *Stanford Law Review* 9 (1956).

Historical description of this sort can provide the basis for understanding many facts critical to evaluation of the effects of dumping or subsidies in a particular market, but common experience does not provide any basis for extrapolation from such descriptions to conclusions with respect to causation. At the simplest level, one cannot see the impact of dumping or subsidization the way one can see the impact of automobiles colliding. Moreover, it is implausible that even the most detailed description of events will simplify the actual impact of import-pricing practices apart from other factors affecting the domestic industry.

A second possible approach would rely on methods often deployed to overcome just this problem. Regression analysis is a common tool of social science for disaggregating multiple possible causes of particular events.

Unfortunately, regression analysis has limited use in dumping and CVD investigations because of data limitations. Data regarding the narrowly defined industries on which the investigations focus are almost never available from secondary sources. Difficulties attendant to collection of information from market participants during ITC investigations severely restrict the data that can be meaningfully assembled by the Commission, usually involving, for instance, price series with quarterly or annual information from a three-year period — and even these are often for a subset of products at issue and at times for a subset of buyers and sellers as well. Given the number of independent variables that can affect industry performance, in the usual case the variables to be "regressed out" so that the effect of the dumping or the subsidy alone can be seen will exceed the number of data points. Statisticians seldom feel comfortable with negative degrees of freedom. Correlation of import volumes with changes in industry performance is possible, but it is unlikely to reveal the effects of dumping or subsidies.

The remaining method of causal analysis is simulation. That requires understanding the way only the forces with which one is concerned operate, and then endeavoring to approximate their operation. Simple simulations have long been used — in law, forensic science, political science, and elsewhere — to analyze causal connections. With the advance of increasingly inexpensive, accessible, rapid computing power, this technique has been used even more widely, being employed now to assess an enormous array of behavioral, physical, financial, and social causation patterns.

Here, simulation would involve analysis of the way dumping or subsidization changes import prices and the way imports compete with the domestic like-product, and then replicate the interaction of lower-priced imports in a market with the characteristics of the domestic market for the imported and domestically produced goods.[21] The analysis generally would track both the analytical factors listed in Title VII and the order in which they are listed: moving from the effects of dumping or subsidies on import prices and volumes, to the effect — mediated through those changes — on prices and sales of the domestic like-product, and, ultimately, to the effects on industry revenues — the product of price effects and sales effects.[22]

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[21] For an elaboration of this approach, see Ronald A. Cass, *Economics in the Administration of U.S. International Trade Law*, Ontario Centre for International Business Working Paper 16 (Toronto, July 1989); Ronald A. Cass and Richard Boltuck, "Antidumping Law and Economics" (unpublished paper, November 1990). For an application of this approach, see, for example, *Bearings (Other than Tapered Bearings) and Parts Thereof from the Federal Republic of Germany, France, Italy, Japan, Romania, Singapore, Sweden, Thailand and the United Kingdom*, USITC Pub. 2185, Inv. Nos. 303-TA-19 and 20 and 731-TA-391-399 (Final) (May 1989) (Concurring And Dissenting Views of Vice Chairman Cass), referred to hereafter as *Antifriction Bearings*; *Telephones I*; and *3.5" Microdisks and Media Therefor from Japan*, USITC Pub. 2170, Inv. No. 731-TA-389 (Final)(March 1989) (Additional Views of Commissioner Cass), referred to hereafter as *Microdisks II*.

[22] For discussion of the relation of this causal analysis to the statutory framework, see, for example, *Telephones I*; *DROs*; *Certain Granite from Italy and Spain*, USITC Pub. 2110, Inv. Nos. 701-TA-289 and 731-TA-381 (Final)(Aug. 1988); *PTFE*; and *Microdisks I*.

Rough forms of this analysis can be performed using qualitative assessments of market relationships, or in slightly less rough fashion, with broad quantitative estimates and the most elementary computational skills. More sophisticated analysis — especially incorporating the capacity to assess effects under different particular assessments of the nature of the market and relation of the products at issue — requires the use of computers.

This last approach must, in a more or less sophisticated manner, inform the Commission's analysis of dumping or subsidies. It may rely on historical description for information about the nature of the markets for the imports and competing like-products, incorporating information gathered in various ways and tested to greater or lesser degree through cross-examination or administrative verification. Correlation of import volumes with domestic industry performance also may supplement simulation analysis, but some form of simulation provides the only means for critically assessing the effects of dumping or subsidies on domestic producers.

Defining Injury

The definition of injury is at once a subject of considerable statutory attention and relatively little clarity. Title VII specifically lists numerous factors that should be taken into account by the ITC in deciding whether U.S. producers have been injured by dumping or subsidies. While some of these factors bear simply on the causal linkage,[23] others more clearly appear to suggest the meaning of injury. These factors principally identify effects of the reduced-price imports on returns to U.S. investment and employment in the domestic industry.[24] The law also specifically draws the ITC's attention to effects on domestic products' prices and sales,[25] effects necessarily antecedent to employment and investment effects.

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[23] For example, the volume of imports under investigation.

[24] 19 U.S.C., Section 1677(7)(C).

At bottom, the law does not point squarely to any single definitive measure of injury. No clear distinction is drawn between mediate and ultimate effects. No attention is paid to a choice between absolute and relative effects. And no express direction is given regarding a distinction between changes in net returns (rents) and gross returns (revenues) to capital and labor.

Nonetheless, several facets of the law favor definition of injury in terms of proportional effects on industry revenues. First, although the law may have been motivated largely by a desire to protect quasi-rents accruing to factors (notably labor),[26] the absence of any instruction to inquire into alternative uses of capital or labor, or even the destination of capital and labor migrating from the affected industry suggests a focus on revenues, not rents. Commentary during congressional discussions and debates generally supports that focus.

Second, as noted earlier, each statutory factor is framed in terms of the effects of reduced-priced imports, not simple changes in industry performance, which again suggests a focus on revenues: rent effects are far more difficult to assess than revenue effects and, hence, decisions based on rent effects will be more prone to error. For the same reason, it is preferable to determine injury on the basis of overall revenue effects, rather than specific effects on capital or labor, since the determination of overall effects will more accurately capture the changes in the industry without detailed information regarding factor relations within the industry.

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[25] 19 U.S.C., Section 1677(7)(B), (C).

[26] These are likely to be most affected by import competition. See Robert Feinberg and Barry Hirsch, "Industry Rent-Seeking and the Filing of 'Unfair Trade' Complaints," *International Journal of Industrial Organization* 7 (1989).

Third, relative effects — measured as proportional changes in industry revenues — are more consistent than absolute measures with a narrow industry definition that will vary with the scope of the imports at issue and the similarity of domestically produced and imported products. Relative measures also are consistent with legislative attention to small industries as well as large, and are less subject to error since mistakes in effects analysis are apt to have proportional, not constant, absolute, impact on ITC assessments.

Setting the Materiality Threshold

The final inquiry is peculiarly left to the judgment of individual commissioners. The circular statutory definition of material injury as "harm which is not inconsequential, immaterial, or unimportant"[27] reveals the inability of those who drafted the law to offer real guidance as to where the material injury threshold should be set. Use of the double negative seems intended to counter any inference that "material" requires a great injury; rather, it need only be an injury not so slight as to be "immaterial." If the Commission were to use a benchmark test of revenue effects of, say, 35 percent, quite plainly there would be ample basis to conclude that it was requiring effects well above the level of immateriality. But there would be no way of knowing *a priori* exactly what threshold change in the industry's revenues best implemented the statutory mandate.

The legislative history contributes only modestly to our understanding of this term. The history contemporaneous with adoption of the material-injury standard indicates general approval of past ITC practice under a simple "injury" — rather than material-injury — standard. The Commission often found that dumping had affected a domestic industry insufficiently to be called injury within the meaning of the prior law.[28]

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[27] 19 U.S.C., Section 1677(7)(A).

Given congressional approval of prior practice, one might endeavor to calculate the level of revenue effects in close cases prior to the adoption in 1979 of the material-injury standard and locate a threshold above which an affirmative determination would be reached. It is unlikely, however, that a clear dividing line will be located, in part because the history of Title VII suggests that some distinction was intended among industries on bases other than static revenue effects.

It is not clear that all relevant variables were discussed in the legislative documents, a matter addressed at some length in the succeeding part of this paper, but both the condition of the domestic industry and the direction of its fortunes were noted as relevant considerations. The thought apparently was that effects on declining industries or on industries experiencing difficulty for reasons unrelated to dumping should be taken more seriously than similar effects on stable or expanding industries. Perhaps the use of a lower threshold in measured effects for weak industries was favored because real adjustment costs to displaced workers would be expected to be greater in those industries than in stronger industries. While one might question the extent to which inchoate concerns in legislative discussion outside the statutory text should inform interpretation of laws,[29] an adjustment for industry condition also is consistent with explicit statutory direction for ITC attention to the specific factors regarding the impact on employment, compensation, investment, and so on, that cannot readily be related to any given causal source.

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[28] Although antidumping duties under the *U.S. Antidumping Act of 1921* were conditioned on an injury finding — a task taken from the Department of Treasury and assigned to the ITC in 1954 — subsidies were made subject to an injury test only after the Tokyo Round Amendments to the GATT, with adoption of the *Trade Agreements Act of 1979*.

[29] See, for example, Frank Easterbrook, "The Role of Original Intent in Statutory Construction," *Harvard Journal of Law and Public Policy* 11 (1988); William Eskridge, "The New Textualism," *U.C.L.A. Law Review* 37 (1990); Daniel Farber and Philip Frickey, "Legislative Intent and Public Choice," *Virginia Law Review* 74 (1988); Earl Maltz, "Statutory Interpretation and Legislative Power: The Case for a Modified Intentionalist Approach," *Tulane Law Review* 63 (1988); Thomas Merrill, "The Common Law Powers of Federal Courts," *University of Chicago Law Review* 52...

This sort of distinction among industries, as well as the difficulty of estimating effects with precision and accuracy, suggests that some range of revenue effects might be specified by the Commission or by each commissioner as establishing the boundaries for materiality and immateriality. On this view, if the ITC concludes with a fair degree of certainty that the dumping reduced the domestic industry's revenues by less than *x* percent, it should issue a negative determination. If it concludes with a fair degree of certainty that dumping or subsidies reduced the domestic industry's revenues by more than *y* percent, it should issue an affirmative determination. In other cases, its decision would depend on its estimation of the most probable revenue effect, the condition of the industry at issue, and other "modifiers" that can be identified from statutory text or legislative history.

Wandering through the Forest: ITC Antidumping and CVD Decisions

Turning to the Commission's decisions, we find frequent examples of decisions that in one way or another approximate some aspect of the analysis sketched above, but very little that corresponds closely on a sustained basis. Commission decisions seldom explicitly state the standards that guide decisions and rarely contain detailed discussion of the way in which evidence is evaluated, the basis for particular factual inferences, and the connection of such inferences to the ultimate decision. Although generally one can understand the basis for

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...(1985); and Kenneth Starr, "Observations about the Use of Legislative History," *Duke Law Journal* (1987).

ITC determinations without great difficulty, much of importance to those determinations is left between the lines of decisions, not on them. Patterns of ITC decisionmaking can be discerned, but substantial deviation from such patterns occurs. And some aspects of the Commission's determinations do not readily fit the statutory framework under which the Commission operates.

It is important to note that the critique of ITC decisions below does not compare antidumping and CVD decisions by the ITC with those of other government agencies around the world addressing these same issues — a comparison in which casual empiricism suggests the ITC's decisions would fare relatively well. The comparison is, rather, with an ideal decision according to the judicial model.

Causation Analysis in ITC Decisions

The most serious defect of the ITC's decisions in dumping and subsidy investigations is the absence of a coherent analysis of the effects of those practices. The majority of the Commission has almost never pursued a counterfactual analysis that would reveal the actual difference in domestic industry fortunes consequent to the dumping or subsidization that gave rise to the investigation. Two independent reasons appear to account for this failure. First, a great many commissioners seem to have followed approaches that are intended to answer that question but are ill-conceived. Second, in recent years commissioners have been asking different questions, some reasonably proximate to inquiry into the effects of dumping or subsidies, but others quite remote. We discuss these issues before addressing the ITC's treatment of the other analytical questions we have flagged as necessary to cogent analysis under Title VII — effects on whom, what effects, and how much? — because the concept of causation is central to the ITC's inquiry and, if rightly conceived, informs resolution of all the other issues.

Commissioners frequently discuss three sorts of evidence in seeking to analyze the effects of dumping or subsidies:

- the trend in volumes of suspect imports — the general class of imports in which the Commerce Department has found some goods to have been dumped or subsidized — over the period of time for which the ITC collects information in its investigation (usually three years);
- a comparison of sales prices in the United States for suspect imports with prices of closely similar domestically produced products; and
- allegations that U.S. producers lost sales to foreign competitors producing the suspect imports.

The most straightforward discussions of causation are found in investigations that produce evidence of increasing volumes of the suspect imports, U.S. sales prices for imports below the prices at which similar domestically produced products are sold, and confirmation that one or more sales of the suspect imports were made to firms for whose business the relevant U.S. manufacturers competed — or to former customers of domestic producers — and that price was a significant consideration in those sales. All of these are taken as evidence of injury from the suspect imports, which in turn supports an inference that dumping or subsidies caused the injury.

The three considerations have a common-sense connection to effects of dumping or subsidies, but they neither isolate the central analytical issue nor define a test capable of determinate resolution. The test mixes analysis of trend information unrelated to dumping or subsidization with analysis of the effects of dumped or subsidized imports. Certainly, the volume of imports benefitting from subsidies or sold at dumped prices is relevant to the effects inquiry, but the volume information presented in most opinions, simply the trend in the volume of suspect imports, by itself does not bear any necessary relation to changes caused by dumping or subsidies. Imagine, for instance, investigation of products with a large and increasing volume of sales by imports but price discrimination between U.S. and foreign markets that yields only a trivial change in the imports' U.S. sales price. Imagine further that the difference between foreign and U.S. prices of the imports — the "dumping margin" — has actually declined over the period examined by the ITC for volume trends. The volume trend information, if taken to be suggestive of the effects of dumping, clearly would be misleading. The Commission, however, does not at present routinely inquire separately into the relation of import volumes to dumping or to subsidies.

Similarly, other information examined by the ITC does not distinguish the effects of dumping or subsidies. Price information, like import volume, is important to analysis of effects, but the information generally adverted to in Commission decisions is not suited to advance that analysis appreciably. The ITC usually compares prices for selected items among the imports and domestic products, endeavoring to determine whether imports are priced lower than domestic products — which the Commission terms "underselling" — or higher — "overselling." The Commission, however, seldom can ascertain that the sales compared are indeed equivalent, and in nearly every case the ITC faces assertions that they are incomparable in some respect — timing, warranty terms, credit terms, service obligations, or other matters, not to mention the quantities sold and the nature of the goods themselves, which may differ appreciably. Given these differences, simple comparison of import prices with the like product's prices can not yield information about the effects of trade practices. The Commission's confusion on this score is reflected more clearly in frequent reference to the relative average unit prices for broad arrays of imported and domestic products, which compounds the difficulty of comparison.

Analysis of price effects by simple price comparison misleads ITC decisions by suggesting effects where they do not exist, and by masking effects that do flow from the suspect import-pricing practices. Consider first the conclusion that price reductions consequent to dumping or subsidies have no effect on prices of U.S.-produced, competing goods because the U.S. goods remain lower-priced — overselling by imports. Plainly, cutting prices on Mercedes-Benz automobiles can affect sales of Cadillacs even if the imports' prices do not fall below the domestic automobiles' prices. The obverse also is true: that Hyundai imports sell for less than Cadillacs — underselling, in Commission parlance — does not indicate the extent of the effect of reducing imports' prices on domestic automobiles' prices. Effectively working markets generally will adjust sales quantities and prices in ways that preclude the sort of strongly irrational circumstances presupposed by the Commission's assumption that it is comparing prices of identical goods sold on identical terms at the same time in the same place but for different prices. The question for the Commission is how that adjustment takes place when prices for one competing good decline.

As with its price-effects analysis, anecdotes about lost sales referenced in Commission opinions have limited analytical utility. It is useful to know how significant price considerations are to competition between imports and domestic goods in analyzing the effects of trade practices that operate principally through altering imports' prices. Collecting stories of sales lost to imports by domestic firms, however, does not allow the Commission to determine the overall effect of the imports on the U.S. market, much less the effect of dumping or subsidies. The relevant question is not: Have domestic producers lost sales to importers? In competitive markets, that happens every day. Rather, it should be: How many *net* sales were lost by reason of price reductions consequent to dumping or subsidies? Unless the anecdotal evidence is complete (covering all sales), is reciprocal (assessing sales lost by imports to domestic products), and is coordinated (so that complaints by two different domestic producers who lost out to an import for a single sale do not count as two lost sales), it is extremely unlikely to provide useful information on the net-sales issue.

Beyond the difficulty of the particular factors examined by the majority of commissioners, ITC causation analysis suffers from the absence of analytical integration: the factors are not part of a coherent, overarching framework for assessing effects of dumping or subsidies, but instead are discrete considerations that do not combine in any definite manner. The majority opinion in *Nitrile Rubber from Japan*, for example, contains a three-page discussion of these factors, concluding that increasing volumes of suspect imports that have an average (per pound) unit value below the average unit value of domestically produced nitrile rubber, had the effect of reducing prices of the U.S.-produced rubber and of reducing sales by the domestic manufacturers as shown by the "numerous instances of lost sales that the Commission was able to verify."[30] Although the opinion declares that all three of the factors move in the same direction of increased imports, lower-priced imports, and lost sales, it does not reveal whether the same result would follow if any of the factors moved in the opposite direction. To our knowledge, the majority at the ITC has never announced a method for dealing with cases in which the factors move in different directions, despite the fact that it often reaches conclusions where that is the case. The factors are discussed and the conclusion is announced, but a test that resolves the intermediate cases is not set forth.

One reason for the Commission's difficulty in assessing causation is a confusion regarding the causal predicate. At times, some commissioners seem interested in assessing the effects of dumping or of subsidies, or at least the effects of the dumped or subsidized imports. Other commissioners plainly view that as irrelevant, asking instead what effects the suspect class of imports as a whole had on competing U.S.-produced goods, without regard for the proportion of those imports found to have been dumped or subsidized or the degree to which they were reduced in price by virtue of dumping or subsidies. Moreover, for one or two commissioners the *magnitude* of effects is, broadly speaking, not relevant to their vote; they look merely for the *existence* of some effects.

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[30] *Nitrile Rubber from Japan*, USITC Pub. 2090, Inv. Nos. 731-TA-384 (Final) (June 1988), p. 13 (Views of Commissioners Eckes, Lodwick, and Rohr).

Not one of these approaches yields a coherent analysis of causation. Combining them, however, is almost inevitably a prescription for confusion. As a result, it is extraordinarily difficult to tell from Commission opinions what is critical to their causation analysis, why the majority reached the result it did in any given case, or what that result foreshadows for future decisions.

Nitrile Rubber is exemplary. It contains a series of assertions about the three causal factors and a conclusion, but the particular statements in the Commission's opinions do not enlighten readers about the way it uses its causation test. Indeed, the particular statements about these factors raise questions about the meaning of the three factors.

For example, the Commission's one explicit reference to relative prices specifies differences in average unit prices without explaining why that measure was used. The opinion cites tables in the ITC Staff Report that contain different information than described in the text of the opinion. The cited tables show the relation between the suspect imports — Japanese-produced nitrile rubber — and U.S.-produced nitrile rubber for three different grades of nitrile rubber sold to two different types of purchaser, revealing great variation in relative prices; the Japanese nitrile rubber, however, according to these tables, fairly consistently sold for less than domestic nitrile rubber ("underselling"). But immediately following these tables in the Staff Report are other tables showing different sets of relative prices in other sales of the three types of nitrile rubber, again with great dispersion, but also with a very substantial proportion of higher-priced sales by the Japanese imports ("overselling").[31] An argument was made that the apparent lack of any consistent relation — or pattern of changing relations — of selling prices for U.S.-produced and Japanese nitrile rubber suggested that their prices were largely independent, so no price effects of one on the other could be inferred. The Commission's opinion does not address that argument.

The majority opinion in *Nitrile Rubber* also states that the suspect imports were "clearly the price leaders in the U.S. market, and...led U.S. prices downward."[32] This assertion was also questioned, and the evidence cited by the majority reveals that prices for Japanese nitrile rubber rose while prices for U.S. nitrile rubber and nitrile rubber imported from other countries declined.

The majority noted that volumes of Japanese nitrile rubber imports had increased over the entire time period looked at by the Commission, but it neither explained the choice of time period — a matter taken up again below — nor addressed the relevance of changes in import volumes during the more limited period examined by the Department of Commerce for evidence of dumping — a period in which the share of the U.S. market held by the Japanese imports declined. Not only is the majority opinion unclear as to how the facts referenced fit the factors that comprise the causation test and as to the combination of factors necessary to satisfy that test, but it is unclear as to how the underlying factual evidence yielded the specific statements in the opinion.[33]

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[31] Ibid., pp. A-36–A-41.

[32] Ibid., p. 13 (Views of Commissioners Eckes, Lodwick, and Rohr).

[33] For example, the record evidence in *Nitrile Rubber* on "lost sales" indicates that many allegations were not supportable, that other imports at times were bought in preference to U.S.-produced or Japanese imports on the basis of price, that price seldom was the principal reason for purchasing Japanese nitrile rubber, and so on.

The lack of clarity in the ITC's causation standard is reflected in the substantial variation in its application. Similar facts with respect to particular factors produce quite different results. *Nitrile Rubber*, for example, found sufficient causal foundation to impose antidumping duties on grounds of increased volumes, a mixed pattern of prices — including many comparisons in which imports had lower prices than domestic products — and some anecdotal evidence of lost sales; the affirmative decision was reached notwithstanding declining market share for the imports during the only period of known dumping, evidence of differences in product quality, some higher-priced import sales, and difficulty substantiating most claims of sales losses owing to price differences alone. In *Brass Sheet and Strip from Japan and the Netherlands*,[34] the majority found sufficient causal foundation in: a similar pattern of importation, with mixed price relationships but generally lower import prices, and no evidence of specific "lost sales." In contrast, the majority of the Commission — including all of those who joined the majority opinion on causation in *Nitrile Rubber* and *Brass Sheet and Strip* — concluded in *Plastic Tubing Corrugators from Canada* that there was not even a possibility that the imports caused injury where: import volumes had declined during the period of investigation by the Commerce Department, the price relationships were characterized differently by Petitioner and Respondent, quality differences arguably affected price comparisons, and price was not clearly the deciding factor in the anecdotal accounts of lost sales. The principal factual difference between *Brass Sheet and Strip* and *Plastic Tubing Corrugators* was that the suspect imports accounted for between 3 and 7 percent of the market in *Brass Sheet and Strip*, where the Commission found injury from dumped imports, while suspect imports accounted for about ten times as great a share of the market in *Plastic Tubing Corrugators*!

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[34] Inv. Nos. 731-TA-379 and 380 (Final), USITC Pub. 2099 (July 1988) (Views of Eckes and Lodwick)(plurality); and idem, (Additional Views of Commissioner Rohr) (differing only on existence of injury on basis of current industry condition). See also *Fresh, Chilled, or Frozen Pork from Canada*, USITC Pub. 2218, Inv. No. 701-TA-298 (Final)(Sep. 1989) (Views of Commissioners Eckes, Rohr, and Newquist).

Evaluation of Commission decisions, indeed, shows no aspect of the majority's causation test to be conclusive. Import volumes may be rising or falling. Underselling is helpful but not necessary, nor are confirmed stories of "lost sales."[35] Markets where sales are on a bid, rather than an open-market, basis may be thought especially susceptible to harm from reduced-price imports,[36] or particularly resistant.[37] While the outcomes of Commission decisions are, for reasons discussed below, generally predictable over a considerable range of cases, nothing in the explicit discussion of causation in the Commission's opinions significantly aids prediction.

Injury, Materiality, Industry

Other aspects of ITC opinions in antidumping and CVD investigations present related, if less trenchant, difficulties. Commission opinions only rarely contain any clear advertence to the level of injury necessary to merit the imposition of duties, and the Commission does not even generally describe a materiality threshold to distinguish sufficient from insufficient effects. The Commission does specifically address the kind of effects that constitute injury, but does so in a backhanded fashion. ITC opinions do not *define* "injury" and then analyze the injury to the domestic industry from dumping or subsidies in light of that definition. Rather, they announce an independent *conclusion* whether material injury exists — treating

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[35] See *New Steel Rails*, p. 23.

[36] See ibid.; and *Mechanical Transfer Presses from Japan*, USITC Pub. 2257, Inv. No. 731-TA-429 (Final)(Feb. 1990).

[37] See *Plastic Tubing Corrugators from Canada*, USITC Pub. 2247, Inv. No. 701-TA-301 (Preliminary)(Dec. 1989).

"injury" as an attribute of the domestic industry unconnected to any causal agent — and they list the factors that inform this decision.

Majority opinions generally treat "injury" as a synonym for "bad condition," discussing this issue in a section entitled "Condition of the Domestic Industry" before any discussion of the role played by dumped or subsidized imports. Even more than with causation analysis, those familiar with ITC decisions have a sense of what moves the Commission in this inquiry, but again the texts of the Commission's opinions — even viewed together with the record behind its decisions — do not provide anything like a determinate test. The Commission routinely lists a series of factors that guide its determination. The Commission's statement in *Nitrile Rubber from Japan* is typical:

> In determining the condition of the domestic industry, the Commission considers, among other factors, domestic consumption, production, capacity, capacity utilization, shipments, inventories, employment, and financial performance.[38]

Most of these factors are listed in the statute with the direction that the Commission consider them in assessing the impact of the dumped or subsidized goods on the domestic producers; not all the factors noted above are in the statute, and not all the factors listed in the particular provision from which these are drawn are noted by the ITC as considerations relevant to this inquiry. Along with recitation of these factors, the Commission routinely observes that this list is nonexclusive.

As with causation, if all of the factors move strongly in a single direction, the outcome is fairly certain, but similar mixtures of good and bad indicators of industry performance produce different results across cases, and the Commission's opinions do not clearly explain the variation. The exposition in *Nitrile Rubber* is again typical. Three full pages of the majority opinion recite facts regarding the various factors relevant to industry condition, emphasizing the trend in each over several years concluding with the last full calendar year preceding the decision. Following the description of these trends, the Commission announced: "Based on our consideration of the foregoing economic indicators, we determine that the domestic industry as a whole is experiencing material injury." No elaboration of the considerations leading from the facts to the conclusion was provided, nor is any commonly given.

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[38] *Nitrile Rubber*, p. 7 (Views of Vice Chairman Brunsdale, and Commissioners Eckes, Lodwick, Rohr, and Cass). Commissioner Cass noted objection to this analysis but joined the description.

In light of decisions such as this, commentators have concluded that Commission decisions on "injury" are predicated on simple gross trends in industry economic performance, negative trends indicating injury and positive trends no injury.[39] The Commission regularly discusses such trends. It does not compare trends in the given domestic industry with trends in other, related industries or in all U.S. industries.

While the *cognoscenti* generally understand what the ITC does with respect to injury, majority opinions do not describe any more precise version of the principles underlying this decision, and commissioners who rely on this approach disagree over its meaning. In a recent case, *New Steel Rails from Canada*, two commissioners who employ a free-standing injury analysis — commonly joining the same opinion — explained their understanding of the injury criteria. One commissioner, in a lengthy disquisition on prior Commission decisions, affirmed his commitment to a material-injury decision defined in terms of the health of the domestic industry, based on industry trends; this commissioner expressly embraced the "healthyindustry test" as descriptive of that approach, and suggested that failure to accept a such a test reveals "inadequate understanding of the historical record."[40] The other commissioner proclaimed that reference to such a test "reflects a woeful ignorance" of the basis for ITC decisions, adding that the health of the domestic industry as reflected by trends in indicators of industry economic performance is not relevant to his separate decision on the existence of material injury:

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[39] See Cass, *Economics in the Administration of U.S. International Trade Law*; Seth Kaplan, "Injury and Causation in USITC Antidumping Determinations: Five Recent Approaches," in P.K.M. Terakau, ed., *Policy Implications of Antidumping Measures* (Amsterdam: North Holland, 1990); and Morris Morkre and Harold Kruth, "Determining Whether Dumped or Subsidized Imports Injure Domestic Industries: International Trade Commission Approach," *Contemporary Policy Issues* 7 (1989).

> The question is not simply [if] the indicators are going down, nor is the question what is the reason why they are going down. The question is whether it is a bad sign for a particular industry that its indicators are going down.[41]

Generally, the majority seems to base conclusions about injury on the general trend in industry performance over the entire period for which data are presented, but the Commission sometimes varies the period for which "injury" is assessed,[42] and as one commissioner who employs a bifurcated analysis has observed, Commission decisions do not consistently draw the same conclusions from industry trends: "Industries whose indicators have gone down over the period have been found to be uninjured, and those whose indicators have improved over the course of an investigation have been found to be injured."[43]

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[40] *New Steel Rails*, p. 66, note 59 (Additional Views of Commissioner Eckes).

[41] Ibid., p. 73, note 7 (Additional Views of Commissioner Rohr).

[42] The Commission generally uses a three-year period for its comparisons (plus a portion of the current calendar year), but in *Nitrile Rubber* was asked by Petitioner, over vigorous objection by Respondent, to use a four-year period (plus a portion of the current calendar year). Examination of the ten indicators of industry performance for which the ITC collected data shows that a four-year comparison produced *declines* in nine categories (most small, but some quite significant), while a three-year comparison revealed *increases* in nine categories (many extraordinarily large). The Commission majority, without comment, used the four-year comparison. See *Nitrile Rubber*, pp. 32–33 (Additional Views of Commissioner Cass).

[43] *New Steel Rails*, p. 73 (Additional Views of Commissioner Rohr) (footnote omitted).

Most troubling is that reliance on industry trends over an arbitrarily selected period cannot be readily explained on grounds connected to investigation of the effects of dumping or subsidies.[44] Separation of this trends — or industry-condition — inquiry from the general issue of the effects of dumping or subsidies has two unfortunate results. It allows the Commission sometimes to terminate investigations where industry performance is improving even though dumping or subsidies may have particularly strong effects on the domestic producers. It also allows commissioners to suppress serious analysis of causation; having already established injury as a prerequisite to addressing causation, there is less need for a rigorous causal inquiry and, hence, duties will at times be imposed notwithstanding the absence of any appreciable injury from dumping or subsidization.

The Commission's analysis of the ambit of its inquiry — what is the relevant domestic industry producing the "like product" in the United States? — is similar to other aspects of ITC decisions in Title VII cases. The Commission generally lists factors that influence the like-product decision, but the factors are not integrated into a coherent analytical framework, are not tied to the ultimate causal inquiry, and are not explained in relation to one another. The result is a set of decisions that look inconsistent,[45] that sometimes lump together quite disparate products,[46] and that are never fully explained. The traditional ITC like-product analysis turns on factors that seem appropriate to defining the focus of the investigation, but discussing the various factors independently, without any lexical priority or cardinal weighing to facilitate joint consideration, reduces the clarity and coherence of the Commission's inquiry.

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[44] We are persuaded that, notwithstanding some opacity in Title VII's direction on this point, the correct reading of U.S. law and the only possible analysis consistent with the United States' GATT obligations asks what difference the practice at issue, dumping or subsidies, operating through changes in import prices and volumes, made in the performance of the domestic producers at issue. The instruction in the GATT is fairly plain. Article VI of the GATT provides:

> No contracting party shall levy any anti-dumping or countervailing duty on the importation of any product of the territory of another contracting party unless it determines that *the effect of the dumping or subsidization*, as the case may be, is such as to cause or threaten material injury to an established domestic industry, or is such as to retard materially the establishment of a domestic industry.

Similarly, the GATT Antidumping Code states that:

> It must be demonstrated that the dumped imports are, *through the effects of dumping*, causing injury within the meaning of this Code. There may be other factors which at the same time are injuring the industry, and the injuries caused by other factors must not be attributed to the dumped imports.

General Agreement on Tariffs and Trade, *Agreement on Implementation of Article VI*, art. 3, section 4 (emphasis added).

Other ITC Decisions: Safeguards and Intellectual Property

Commission decisions under other contingent trade remedy laws within its jurisdiction differ somewhat from the pattern described above. Decisions under the "escape clause" or "safeguards" provision — Section 201 of the *Tariff Act of 1930* — generally resemble antidumping and CVD decisions, but with more predictable outcomes. The ITC's decisions under Section 337 of the *Trade Act of 1974*, principally concerned with claims respecting intellectual property, more closely resemble the judicial model.

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[45] See, for example, David Palmeter, "Injury Determinations in Antidumping and Countervailing Duty Cases — A Commentary on U.S. Practice," *Journal of World Trade Law* 21 (1987).

[46] For example, in *New Steel Rails from Canada*, the Commission analyzed together imports of steel rails usable on rail lines and steel rails that, because they did not meet the requisite specifications, were only useful in very limited applications and essentially sold for relatively little more than scrap value. In other words, the Commission treated a product and its unintended byproduct as though they were economically equivalent goods.

Section 201

In its original form, Section 201 was amenable to fairly direct implementation. It provided that if imports increased consequent to a trade concession by the United States — usually a tariff reduction — businesses that were severely injured by the increase could seek relief for a temporary period to facilitate adjustment to the changed environment. Amendments to the law over time have significantly reduced the law's coherence. Increased imports no longer need to be the consequence of a trade concession nor the cause of serious injury. Instead, the imports may be increasing for any reason[47] and must be a substantial cause of the injury, defined as a "major cause and no less important than any other cause."[48]

By severing cause from effect in this way, the law's revisers introduced into safeguards law analytical problems similar to those that ITC decisions have engendered in Title VII law. The language of Section 201 makes analysis especially problematic because the critical causal factor — effects of which must be at least as great as those of any other causal factor — is not an independent cause. Imports increase for various reasons: increased foreign production, decreased demand outside the United States, or lower costs of exporting to the United States — for example, because U.S. tariffs have been reduced. These reasons for increased imports can constitute independent causes of effects on U.S. producers of competing products, but the mere fact of increased imports cannot.

Several alternative analytical constructs have been advanced to allow rational implementation of Section 201 in the face of this difficulty.[49] All approaches, however, retain some difficulties. It should be noted that commentators are fairly uniform in concluding that the approach taken by the ITC lacks the analytical coherence of any of these proffered alternatives, resting on disaggregated factors that do not readily combine to produce a meaningful test.

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[47] Indeed, arguably the imports need not increase at all so long as they rise relative to U.S. production. See Kenneth Kelly, "Can Imports Injure a Domestic Industry When They Decline?," *Research in Law and Economics* 12 (1989).

[48] 19 U.S.C., Section 2252(b)(1)(B).

The ITC's interpretation of revised Section 201, however, yields fairly predictable results owing to the injury threshold used by the Commission. The law requires that the industry seeking relief be seriously injured, and the Commission has taken this instruction to mean that the industry is in a financial downturn that is "crippling" or "mortal" and not modest or transitory.[50] Relief has been denied frequently for failure to pass this threshold. In the three years from March 1987 to March 1990, only one case under Section 201 was filed with the ITC, and relief was denied on grounds of insufficient evidence of financial distress.

The difference between Section 201 and Title VII lies in the height of the threshold to be cleared and in the greater apparent fidelity of the two-step approach to the Commission's legal mandate in safeguards cases. The insistence on demonstration of serious distress assures a degree of consistency in outcomes that is not explained by the analytical constructs employed.

Section 337

Commission decisions under Section 337 diverge more significantly from Title VII decisions. The section, initially conceived as a catch-all provision for attacking foreign unfair trade practices, was broadly defined and hardly ever used prior to a substantial revision of procedural requirements in 1974.[51] Since then, it has been extensively used to press claims that imports infringe U.S. intellectual property rights. From 1975 until the passage of the *Omnibus Trade and Competitiveness Act of 1988*, the law imposed three sorts of requirements for relief under Section 337. First, complainants had to satisfy a set of standing requirements, including the existence of sufficient activity within the United States connected with the property right at issue — usually, domestic production of a patented article or use of a patented process — to constitute "a domestic industry." Second, complainants had to establish their underlying legal claim, such as infringement of a valid U.S. patent. Third, complainants had to demonstrate sufficient injury from the unfair practice to warrant relief. If these requisites were met, the Commission would then determine whether relief was in the overall public interest and decide on a remedy, including ordering the U.S. Customs Service to exclude all offending items from entry into the United States.[52] The 1988 revision of Section 337 established a separate track for certain intellectual property rights claims, reducing the showing necessary to satisfy the domestic industry requirement, eliminating other standing requirements, and deleting the injury requirement.[53]

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[49] Eugene Grossman, "Imports As a Cause of Injury: The Case of the U.S. Steel Industry," *Journal of Industrial Economics* 16 (1986); Kenneth Kelly, "The Analysis of Causality in Escape Clause Cases," *Journal of Industrial Economics* 37 (1988); Robert S. Pindyck and Julio J. Rotemberg, "Are Imports to Blame? Attribution of Injury under the 1974 Trade Act," *Journal of Law and Economics* 30 (1987); and Donald Rousslang, "Import Injury in U.S. Trade Law: An Economic View," *International Review of Law and Economics* 8 (1988).

[50] See, for example, *Electric Shavers and Parts Thereof*, USITC Pub. 1819, Inv. No. 201-TA-57 (1986).

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[51] See, for example, Ronald A. Cass, "ITC Action under Section 337," in Bureau of National Affairs, *Competing under the Omnibus Trade and Competitiveness Act of 1988* (Washington, D.C., 1989).

[52] For discussion of the remedial provisions in Section 337, see V. James Adduci, "Unfair Import Competition: Section 337 of the Tariff Act of 1930, as Amended by the Trade Act of 1974," in C. Johnston, Jr., ed., *Law and Practice of United States Regulation of International Trade* (New York: Oceana, 1987).

[53] These changes are discussed in Ronald A. Cass, "Changes in Section 337 under the 1988 Omnibus Trade Act," in H. Applebaum and L. Schlitt, eds., *The New Trade Law: Omnibus Trade and Competitiveness Act of 1988*, (New York: Practising Law Institute, 1988). At this writing, the Bush ...

Commission decisions under Section 337 have been criticized for inconsistency and failure to adhere to precedent only on quite limited grounds.[54] These critiques primarily are restricted to determinations respecting the injury and industry issues, one of which is no longer present in most cases, and the other of which has diminished in importance.

With these exceptions, the ITC's decisions conform reasonably well to the judicial model. By and large, the decisions are carefully and extensively reasoned, with opinions clearly explaining the basis for decision, both legal and factual. They generally provide coherent analysis of the critical issues, generally fit to a consistent pattern, and display a fairly strong commitment to precedent on the core issues respecting intellectual-property rights — commonly, patent validity and infringement. These decisions are also, as a group, consistent with legal rules. Although decisions have been reversed on appeal, casual observation does not suggest that the rate of appeal or reversal exceeds that of federal district courts deciding similar intellectual-property issues. Reversal, moreover, often is on grounds that are subject to debate among experts in intellectual property law — that is, in this area the ITC tends to be reversed only for reasonable mistakes of law, not for capricious decisions.

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administration is considering a restructuring of the Section 337 process to respond to GATT objections based on procedural differences between this provision and patent litigation in district court.

[54] There has been criticism of various aspects of Section 337 as written and implemented, most notably leading to the GATT's decision that the section is inconsistent with the "national treatment" obligation imposed on contracting parties by the GATT. See, for example, David Foster, "Section 337 Determined To Be Inconsistent with U.S. GATT Obligations," *I.T.C. Trial Lawyers Association Section 337 News* (January 1989). For discussion of these issues, see Nathan G. Knight, "Section 337 and the GATT: A Necessary Protection or an Unfair Trade Practice?" *Georgia Journal of International and Comparative Law* 18 (1988). These issues are not relevant to the arguments advanced here regarding ITC administration of Section 337.

ITC Procedures

The procedures used by the ITC in arriving at decisions under Title VII, like the opinions themselves, suggest some departure from the judicial model. Title VII procedures are in many respects judicial, but they also differ in several respects from the procedures used in most adjudications, including the ITC cases under Section 337.

The typical judicial process involves adversarial production and testing of information, adversarial argument over critical analytical issues, consideration of the factual record and arguments by the adjudicator, and disposition of the case when the adjudicator is able to resolve the issues without any fixed time period for decision. Where adjudication is by collegial bodies, there generally is collegial discussion of the issues, circulation of and comment on draft opinions, and announcement of the decision only after final agreement on the written opinion for the majority and final preparation of any concurring or dissenting views.

The Commission's procedures for antidumping and CVD investigations depart somewhat from each of these elements. The collection of information depends in part on submissions by the adversaries, but in larger part consists of independent efforts by the Commission's staff. Questionnaires provide the principal vehicle for data collection by the staff, which sends questionnaires to the set of domestic producers, importers, exporters, and purchasers of the relevant products identified by the parties or by the staff as having information useful to the investigation. The questionnaire responses are tabulated by the staff without explicit assessment of confidence levels for accuracy based on response rate. No serious testing of the information through cross-examination by adversaries takes place. The hearing process consists mainly of a combination of factual presentation and issue argument by parties with questions put by the commissioners and, to a lesser extent, by Commission staff. Parties are allowed to brief the relevant issues, and supporting analysis usually is provided by ITC staff as well.

The decision of the Commission is arrived at without prior discussion of the issues by commissioners, who — at least under present interpretation of the "Government in the Sunshine" law at the ITC — are precluded from private discussion of Title VII cases, and precedes drafting of written opinions. This decision is made in public and constitutes the final decision of the Commission. The opinion of the majority is then drafted by attorneys in the Office of the General Counsel and circulated to commissioners who comprised the majority — in case of a tie among the six commissioners, the majority is comprised of those voting in favor of trade relief — but the opinion is not circulated to dissenting commissioners. Indeed, unlike any other judicial process, the parts of the opinion with which a commissioner voting in the majority is not expected to join are not distributed to, and are not available even on request by, that commissioner. The commissioners who form the opinion majority then edit the opinion and agree on a joint opinion.

Decisions are made under statutory time limits, usually allowing 45 days from the filing of a petition until submission of opinions in preliminary investigations and 45 days from the Commerce Department's final determination on dumping or subsidies until submission of opinions in final investigations — usually 120 days from the preliminary determination by Commerce. During this time, the Commission must conduct its investigation, decide the case, and finish its opinions. The division of time among these processes lies with the Commission. Generally, the staff will complete its information collection and analysis tasks and submit the relevant materials to commissioners in preliminary investigations between one and four days prior to the Commission's vote on an investigation — earlier in final investigations — and the commissioners' opinions usually will be due between two and seven days following the vote.

The procedure used in a Section 337 investigation more closely resembles an ordinary judicial proceeding. After initiation of the investigation, which requires a vote of the Commission, the proceeding is before an administrative law judge (ALJ), who is a lawyer trained in trial procedure and usually familiar with intellectual-property issues. The ALJ supervises the discovery process, schedules briefing and argument, presides over a trial-type hearing — including direct and cross-examination of witnesses by opposing counsel — and writes an initial decision on the factual and legal issues. These proceedings differ from the standard judicial model in only a few respects: in addition to the holder of the property right being asserted and the alleged infringer, a lawyer from the ITC's Office of Unfair Imports Investigations (OUII) participates in the proceedings, and the proceedings are conducted under time constraints — nine to 15 months, depending on the complexity of the case). Following the ALJ's determination, the commissioners may review the decision in their discretion — on request of a party, including OUII, or on their own motion. commissioners may not discuss pending cases with OUII lawyers or with the ALJ. Decisions by the Commission are on written opinions, prepared by the Office of General Counsel, circulated to all commissioners, and subject to agreement of a majority.

Explaining ITC Decisions

Administrative Intent

The preceding discussion demonstrates that if the ITC commissioners were assumed to be trying to write opinions in antidumping and CVD investigations that conform closely to the judicial model, articulating the effects of price discrimination and subsidization in a manner that plainly implements the technical aspects of the analysis suggested — admittedly with less than complete clarity — by the governing statute, their efforts could not be deemed fully successful. Further, the procedures the Commission has adopted, although judicial in many respects, are in some respects not well-conceived to yield opinions fully in accord with the judicial model.

The question, then, is whether the commissioners are simply not succeeding at this task or are instead endeavoring to perform a different one, perhaps, as some have suggested, including allowing play for "political" factors not specified in Title VII. Before discussing the two most promising explanations for this possible behavior, we have considered and rejected three obvious alternative explanations, which are discussed briefly below.

First, it is possible that the commissioners do try to implement the technical considerations in the statute and that their individual views, separately stated, admit of clear and coherent presentation and would produce a consistent pattern of decisions, but that differences among the individual views generate the difficulties discussed above. This is a problem common to group decisionmaking.[55] It does not appear to explain the observed qualities of ITC opinions, however, since opinions by individual Commission members generally exhibit the same qualities as opinions for the group.

An alternative explanation consistent with an intent to conform to the judicial model is that commissioners, who generally are not trained in either law or economics, simply are unable to produce clear and coherent opinions implementing Title VII's technical considerations. This is not a convincing explanation. The ITC produces good judicial opinions, in the main, in Section 337 cases. Moreover, the commissioners, regardless of background, can select staff and can assign opinion drafting to staff members better able to prepare judicial opinions. Indeed, there is little reason to doubt that those who currently draft Title VII opinions could craft opinions that better fit the judicial model if directed to do so.

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[55] See K. Arrow, *Social Choice and Individual Values*, 2d ed. (New Haven: Yale University Press, 1963); and Frank Easterbrook, "Ways of Criticizing the Court," *Harvard Law Review* 95 (1982). For a recent extension of this work, see Edward Schwartz, "Policy, Precedent, and Power: An Institutional Theory of Supreme Court Decision Making" (Paper prepared for the University of California at Berkeley, August 1989).

Finally, it might be thought, with some justification, that the procedures followed in Title VII investigations inhibit production of opinions more consistent with the judicial model. While the difference between Title VII procedures and Section 337 procedures no doubt accounts for much of the difference in the opinions produced, this observation only restates the question. Why would the Commission follow procedures under Title VII that are less conducive to good judicial opinions? After all, the Commission is, within broad limits, free to adopt the same sort of procedure for its antidumping and CVD investigations as it employs for Section 337 investigations.[56]

It thus appears to us that the commissioners in fact are not endeavoring to implement fully a judicial model as we have cast it. The question is, why not? We do not propose a psychological inquiry here into the real intent of ITC commissioners, but propose only to seek an explanation that seems consistent with most of the facts known to us about the Commission.

We start with the proposition that commissioners want to produce opinions that are not fully transparent and that do not rigorously implement an analytically determinate model of causation. In other words, the opinions do not announce the essential factors that influence the outcome of a significant range of antidumping and subsidy cases because the commissioners who comprise the majority do not want to announce those factors: opinions are written in the manner described above because commissioners desire to preserve some area of discretion to allow decisions to be influenced by factors outside those technical considerations specifically included in the law.

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[56] Notably, the time limitations of Title VII are considerably tighter and not subject to extension by the ITC. The Commission is, however, free to allocate its investigative time differently — for example, by allowing longer time to write opinions.

This, in turn, we believe, reflects the commissioners' judgment as to the sort of decisions that are truly intended by the governing law. Commissioners' understanding of the intent of that law might come from the courts, but that seems unlikely. Courts have not demanded unclarity or scope for considerations not stated in the law. Courts do, however, allow some room for administrative "expertise," which might denote either a sense that technical judgments are peculiarly within the purview of the agency or that political judgments are permitted to some degree in qualification of more determinate technical judgments.

It is quite possible that the room allowed for discretionary exercise of administrative expertise in some measure explains agency opacity. Insofar as reviewing judges have not themselves been clear about the boundaries of permissible agency expertise, administrative unclarity might be seen as derivative of judicial review. Given uncertainty about the statements that might be found to reveal improper application of the statute's criteria or improper importation of extra-statutory criteria into agency decisions, administrators seeking to avoid judicial reversal might try to mask the basis for their decisions in an effort to induce judicial deference — essentially taking the position that if courts can not understand the critical bases for decision, they must defer to the agency.

Note, however, that this does not provide a real explanation for agency opacity. Administrative unclarity under this view does not respond to courts' interpretation of legislative intent. Instead, unclarity is designed to avoid reversal from violating legal strictures. If those strictures are understood and commissioners intend to be governed by them, obfuscation appears inferior to clear exposition of considerations consistent with the governing law as written. If those strictures, as viewed by the courts, are unclear, but the agency intends simply to stay within those judicially translated strictures, clear statement of the bases for the agency's decisions would seem to increase the prospects for elucidation on the shape of the legal mandate.

Alternatively, commissioners may be uncertain about judicial views but believe that, notwithstanding possible judicial disagreement, their actions are consistent with congressional desires. We accept that hypothesis as the most plausible description of administrative intent.

The argument advanced here is not that the commissioners are indifferent to the statute, which specifies with some particularity the factors that control disposition of these cases. Rather, our claim is that they do not view those factors as creating an entitlement to relief that is completely determined by the sort of analysis explicitly addressed in the law; for the majority of ITC commissioners, the factors provide broad outer bounds around the entitlement to relief and contribute to the decision to grant or withhold relief to cases within those bounds, but do not fully capture the considerations they believe were intended by Congress to govern Title VII decisions.

If this hypothesis is correct, we must find an explanation for congressional intent to have the Commission consider factors not explicit in the governing law and to have the Commission refrain from discussion of those factors. We now turn to those issues.

Congressional Intent

Agent Transparency and Agency Costs

On first consideration, the second part of the congressional intent posited above — to have the ITC refrain from clear discussion of all of the bases for its Title VII decisions — appears quite baffling. One notion behind the judicial model's emphasis on clear discussion is the relevant actors' difficulty of knowing how to influence decisions or to alter primary conduct so as to increase the prospects for a favorable decision when critical considerations are not addressed. The problem is no less acute for Congress than for businesses that may be subject to antidumping or CVD investigations or that may contemplate initiating such investigations.

The problem faced by Congress is exactly that faced by any principal who wants to assure that an agent does what the principal wants. The principal can try to solve this problem in three ways. First, the principal could examine the agent's output — such as how many bricks an employee brickmaker produces per hour — and sanction the agent if the output does not conform to the principal's wishes. Second, the principal could observe the product process to assure that the agent performs those operations that yield the desired output or observe particular inputs to the agent's performance — such as how many hours the brickmaker works — that seem likely to correlate with faithful performance, again sanctioning the agent if performance is not appropriate. Third, the principal could provide incentives such that the agent will provide the desired output even in the absence of monitoring and sanctioning by the principal — for instance, a profit-sharing plan that reduces goldbricking.

In many settings, the proper solution or mix of solutions to the "agency cost" problem faced by every principal can be identified fairly readily.[57] Congress, however, often faces agency cost problems that are less pliant. In great part, this follows from the difficulty of compressing the divergent views of the members of any legislative coalition into a single, clear objective.[58] Even if we put that problem aside, however, Congress still confronts considerable difficulty in resolving agency cost problems as a result of the frequent unobservability of both the desired output and many of the critical inputs.[59] It is hard to tell, for instance, if the National Labor Relations Board (NLRB) produces the right mix of workers' rights and employers' prerogatives, or if the Federal Trade Commission (FTC) produces the right amount of deterrence of deceptive advertising. Often, indeed, the desired output is described by Congress not as an independent objective but instead as the product of a particular set of circumstances. The set of acts desired by Congress of the NLRB or the FTC depends critically on the circumstances presented in particular instances — such as whether consumers are likely to be deceived by a given advertisement. Yet these circumstances, too, often are not readily observed by Congress.

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[57] See, for example, J. Pratt and R. Zeckhauser, "Principals and Agents: An Overview," in J. Pratt and R. Zeckhauser, eds., *Principals and Agents: The Structure of Business* (Boston: Harvard Business School Press, 1985).

[58] See, for example, Ronald A. Cass, "Allocation of Authority Within Bureaucracy: Evidence and Normative Analysis," *B.U. Law Review* 66 (1986); idem, "Privatization: Politics, Law, and Theory," *Marquette Law Review* 71 (1988); Kenneth Shepsle, "Congress Is a They, Not an It: Legislative ..

Written opinions conforming to the judicial model can reduce agency costs in these situations by facilitating both output monitoring and input or production process monitoring. Such opinions describe inputs that may be difficult to assess otherwise, and describe the relation between specified inputs and the decisional output — that is, they describe the "production process" for the administrative agency's output. Insofar as they reveal that the agency has properly taken account of the "technical" considerations specified by Congress, opinions in line with the judicial model also facilitate

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58 - cont'd.

Intent as Oxymoron" (Stanford Law School, October 1990). The problem becomes more difficult when the President is considered along with legislators; presidential veto power makes the President's views critical to location of the successful coalition's proposal in the relevant decision space in many circumstances, but the interplay between the President's views and the legislators' can be quite complex. See, for example, John Ferejohn and Charles Shipan, "Presidential Veto and Congressional Influence on Bureaucracy," *Journal of Law, Economics and Organization* (forthcoming).

[59] See Ronald A. Cass, "Damage Suits Against Public Officers," *University of Pennsylvania Law Review* 129 (1981); and Bengt Holmstrom, "Moral Hazard and Observability," *Bell Journal of Economics* 10 (1979).

identification of the desired outputs. Given the difficulty of evaluating outputs for conformity to principles that rely on unobservable inputs, the principal's monitoring plainly is facilitated in such settings if the agent is clear about what has been taken into account and how those considerations fit the agent's decision. Other things equal, the lower the degree of transparency the greater the costs of monitoring an agent's performance.

While this is clear where adherence to a generalized principle is desired, we cannot readily identify reasons why it would not be so universally. Stated differently, on first impression, the judicial model of decisions would seem to dominate as a means of minimizing agency costs. Moreover, if one puts the direct cost of monitoring aside, and focuses on the reasons why Congress may think a particular course of action desirable — by virtue of its effect on others — it appears that adherence to the judicial model for opinions of Congress' agents will increase the value of the decisions by the agent to all who are concerned. If Congress is viewed as providing returns to "customers" — as in rent-seeking models of representative government — clarity by its agents increases the value of the products produced by Congress through the agent by making them more predictable and by reducing the costliness of resolving disputes as to entitlements under the legislation. If Congress is viewed as producing public goods, the result still holds.

We have been unable to find an entirely satisfactory answer to the question of why Congress might nevertheless prefer an alternate model with less transparency, higher agency costs, and products of less value to beneficiaries. Given the absence of a plausible reason for desiring opaque decisions from the ITC or any other agent as an independent proposition, the solution to this conundrum must lie with reasons why the principal itself might not be explicit about its own considerations. Some such reason is a necessary condition for countenancing opaque decisions by the agent. As discussed below, however, even finding a basis for opacity by the principal does not suffice to show that opacity by the agent is desired.

In the following sections, we offer our tentative suggestions as to why Congress might itself choose not to be transparent, and the basis for inferring from that choice a congressional preference that the ITC also not articulate fully the reasons for its actions. We then consider the consequences of that choice in ITC behavior and in related congressional behavior with respect to this agent.

Congress and Its Unstated Preferences

As described above, antidumping and CVD determinations by the ITC subsume four sorts of issues, concerning the object of the Commission's effects analysis, the shape of that analysis, the nature of the critical effects, and the magnitudes of those effects requisite for imposition of duties. For present purposes, these analytical issues can be sorted into two components of ITC decisions. First, the Commission must define the shape of its inquiry: it must determine what adverse consequences experienced by what persons in what magnitude constitute "material injury" within the meaning of the statute. This component includes three of the four issues. Second, the ITC must decide how to conduct its inquiry, how to determine whether injury as so defined was caused by the price discrimination or subsidization specified in the statute. This is the core-causality issue.

We believe that the departures from the judicial model with respect to the first of these two components are less surprising, less important, and less interesting than those with respect to the second. All liability systems face the need to restrict relief to some segment of the people who are directly or indirectly harmed by a specified conduct. Doctrines such as proximate cause in torts and similar formulations in antitrust separate those who can recover from those who can not with considerable imprecision resulting in some uncertainty for those subject to the legal regime. But these "gray" areas, reflecting the variety of considerations which are influential in determining the limits which are imposed, do not impair the essential coherence of the system in that those people who do recover are required to establish a causal connection between their injury and the specified conduct. By contrast, in ITC opinions, it is the threshold, fundamental issue of causality that is obscured, so that some people whose "injury" may result from factors having virtually nothing to do with "unfair" foreign competition may nevertheless receive relief, and some who have been significantly injured by dumping or subsidization may be denied relief.

According to the terms of the statute, and if the GATT is to be complied with, relief is only to be granted if injury of sufficient magnitude would not have occurred if the foreign firms, in the case of dumping, and foreign governments, in the case of CVD law, had refrained from the "unfair" practice at issue. As explained earlier, to determine if this is so requires an extended chain of reasoning. First, in the case of dumping, it must be decided what price would have been charged in the United States if the firm had been constrained to charge the same price in the United States as it charged abroad. Similarly, in the case of subsidization, it must be decided how the firm would have behaved in offering goods for sale in the United States if the subsidy had not been available. Second, it must then be decided how such changes in the behavior of foreign firms would have altered the prices and sales of the relevant goods — including the competing domestic goods — in the U.S. market. Third, it must be determined how the U.S. industry would have fared in such a world. Finally, how they would have fared must be compared with how they fared in the actual world where the practices deemed "unfair" in the governing statute did occur. If the difference in outcome satisfies the definition of "material injury," relief is to be granted.

The starting point in trying to explain ITC departures from the judicial model is a realization of the complexity of this series of inquiries. These complexities make manifest the great value of adherence to the judicial model in making explicit the methodology employed so that litigants can address the important issues, people can predict the results that will be reached, and Congress and other interested parties can understand what the ITC is doing. In this regard, it should also be emphasized that these are the type of complexities that effectively can be illuminated by clear, coherent discourse. They implicate issues as to appropriate modelling of behavior and measurement of empirical magnitudes, areas where great expertise is available. That expertise is, moreover, present in the Commission's staff and has been tendered to the Commission in scholarly writings, briefs and interventions in ITC proceedings. Why then does the ITC not draw on these sources and produce decisions that systematically analyze the causality issue?

A Cynical View. One answer that might be given is wholly cynical about the nature of government. The first component in a wholly cynical answer is that ITC commissioners believe that Congress wishes relief sometimes to be granted when the causality requirement is not satisfied if the industry seeking relief has sufficient political power and, perhaps, sometimes to be denied even though the causality requirement is satisfied if the industry has too little political power. Thus, rigorous analysis of the causality issue is to be avoided because it genuinely constrains the grant of relief in cases where Congress wished it to be provided and the withholding of relief in cases where Congress wished it to be withheld.

This explanation is often referred to as "fiscal illusion," but it also appears in the guise of various "take the credit and avoid the blame" hypotheses for congressional actions.[60] The essence of this explanation is the ability of the principal, by suppressing articulation of what it is doing, to fool some universe of relevant actors — presumably those who bear the costs of the legislation. There is a certain intuitive plausibility to this explanation predicated on differential access to information. Information, while a "public good," is costly to produce and to disseminate. It is reasonable to expect that in some circumstances, as where the benefits of an action are highly concentrated and its costs widely dispersed, information about the action or about its consequences will be asymmetrically distributed, at least for some period of time. Given the difference in information about the true nature of the action, there may be real gains to being surreptitious about its exact nature. Much congressional action has been characterized in this way.

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[60] See, for example, Peter Aranson, Ernest Gellhorn and Glen Robinson, "A Theory of Legislative Delegation," *Cornell Law Review* 68 (1982);...

In the particular case of antidumping and CVD law, there is special reason to believe that Congress may have intended a result that it did not fully articulate, and that illusion may account for the absence of fuller articulation. There are two aspects to this explanation.

First, trade relief often presents opportunities to confer quasi-rents on concentrated recipient groups while spreading costs widely across consumers of the affected products.[61] If Congress intended to mandate trade relief generally in such circumstances, it well might have thought that no good would come of saying so directly: the beneficiaries would know they were being benefitted far more quickly than the consumers would realize they were being assessed additional costs. Even

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...Morris Fiorina, "Legislative Choice of Regulatory Forms: Legal Process or Administrative Process," *Public Choice* 39 (1982); Morris Fiorina and Roger Noll, "Bureaucrats and Legislators: A Rational Choice Perspective on the Growth of Bureaucracy," *Journal of Public Economy* 9 (1978); and Werner W. Pommerehne and Friedrich Schneider, "Fiscal Illusion, Political Institutions, and Local Public Spending," *Kyklos* 31 (1978).

[61] See, for example, Feinberg and Hirsch, "Industry Rent-Seeking and the Filing of 'Unfair Trade' Complaints."

if the cost to individual consumers were small, and in itself not a reason to vote against a representative who supported this legislation, the direct statement of a principle that boldly embraced such a political cost-benefit calculus might be taken as a signal of the representative's inclination to support a series of actions that impose greater costs than benefits on a large segment of the voting population. Similarly, if the magnitude of such benefits were intended to depend on the political power of the industry, a legislator would be understandably reluctant to be associated with such a principle.

Second, the particular contingent trade remedy laws with which we deal are exceptions to a general multilateral agreement that constrains trade relief. Arguably, Congress would have wanted to grant considerably more relief to businesses and to grant relief on the basis of domestic political considerations that the GATT rules out of bounds. If the intent behind Title VII is seen as, in essence, cheating on the GATT agreement, it is reasonable to attribute to Congress a desire to appear to be GATT-consistent in framing Title VII's entitlement to trade relief expressly on grounds that conform to the Antidumping Code and the Subsidies Code, while covertly wishing to have the ITC grant relief in a broader category of cases.

This view of congressional intent, apart from its wholly cynical quality, could lead in different directions, depending on the more precise characterization of Congress's intent. That intent could be a general desire to stretch the GATT agreement as far as possible without triggering difficulties with our trade partners. That form of the "fooling people" thesis, however, while consistent with a very low threshold for material injury, is not consistent with unclarity on any ground other than the *quantum* of injury. Alternatively, Congress might wish the ITC to give trade relief when it would be politically desirable for Congress to have done so. For this to explain some inarticulate aspect of trade law would require politically desirable relief not to be strongly correlated with the magnitude of effects from dumping or subsidization. It seems reasonable that Congress would find trade relief politically desirable in some instances where dumping or subsidization do not exist or do not cause significant harm to a domestic industry. And if Congress intended that the ITC stretch the contours of dumping and CVD law to accommodate more general political interests in trade relief, it would almost certainly not want to express that instruction clearly in legislation that purported to be GATT-consistent.

The problem with this "illusion" explanation, both in general and with respect to Title VII, is its unruliness. In general, illusion is an attractive *ex post* story about much legislative action, but it lacks any sort of rigor in the comparative sense. How do we know when Congress will act in this way, and how much of its action in any given case can be attributed to illusion? We know of no body of evidence that demonstrates the quantity of fooling that can be produced in any set of circumstances or that distinguishes different circumstances in any but the most conclusory terms.

The net benefits yielded by such fooling are even more difficult to capture. Insofar as much fooling takes place, there should be a discount in the value placed on any explanation given by Congress and, indeed, on the perceived value of whatever Congress does. Perhaps the result of this recognition that fooling takes place is a sort of "lemons" market such as George Akerlof describes for used cars.[62] Illusion then would be likely to impose general costs on the legislative process that would exceed the value of the illusion; it would require additional efforts to signal sincerity and might effect a "tax" on the most sincere legislators, who also, in the absence of illusion, would be best positioned to promote — would be least-cost suppliers of — legislation they supported as it appeared on its face. Illusion, indeed, insofar as it exists, may be the product of a "prisoner's dilemma": congressmen would be better off if they credibly could commit to full, sincere explanations of their actions, but there is no effective means for policing such commitments. The contours of this explanation have yet to be explored rigorously.

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[62] George Akerlof, "The Market for 'Lemons': Qualitative Uncertainty and the Market Mechanism," *Quarterly Journal of Economics* 84 (1970).

Beyond its general difficulty, in the particular example at issue here, the illusion story presents a variety of questions. For one thing, why should Congress want silently to encourage the ITC to avoid critical assessment of the effects of dumping and subsidies to provide trade relief, rather than use some form of trade remedy that is more closely connected to the sort of general political considerations Congress might be unwilling to articulate in the Title VII context? Why not simply increase pressure on the political trade negotiation track — something Congress has not been notably reticent to do? If the answer is that Congress wants to use all the levers at its disposal to increase trade relief, why would an inarticulate message to that effect be associated with Title VII but not apparently with Section 337, which, as crafted prior to 1988, was an open-ended mandate to impose sanctions against any "unfair" practice related to imports? And if Congress wants to fool people by seeming to mandate technical relief while really intending greater scope for politically advantageous trade relief, why would it go to such great lengths to direct the ITC's inquiry along the technical track? Title VII, after all, articulates an extensive list of technical considerations, requires that the ITC address specific factors in every case, requires that the Commission explain its use of these factors, that it detail any nonstatutory factor that affects its decisions, and that it also explain how that factor affects its determination.[63]

It is noteworthy in this regard that the opposition of "political" considerations to "technical" considerations does not separate factors that legislators concerned with reelection would pay attention to from factors that would be of no relevance to such concerns. Technical considerations plainly can have political derivation, whether legislators are viewed as servants of rent-seeking interests or of some more general "public interest." They differ from "political" considerations merely in being embodied in a principle articulated in advance of the particular determination at issue. Technical considerations, hence, might be thought to represent stable political considerations, those that are expected to have predictable consequences for politically sensitive interests over time. It follows from this that introduction of the realistic notion of politically sensitive legislators does not automatically lead to the conclusion that Congress would prefer that considerations other than those we have labelled as technical should govern ITC decisions.

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[63] 19 U.S.C., Section 1677(7)(B).

Moreover, as noted earlier, fooling those you wish to fool is costly. It makes it difficult to communicate with the beneficiaries and administrators whom you presumably do not wish to fool. It also complicates the process of arriving at agreement with respect to the content of legislation. It is nonetheless conceivable that failure to state clearly a consideration Congress intends to be taken into account can yield sufficient benefit from reduced opposition to legislation to be a rational legislative strategy — as would occur where increased information costs of opponents dominate the increased agency costs with respect to supporters and administrators. In sum, we cannot establish a persuasive case that Congress left some aspect of its desired resolution of antidumping and CVD cases unstated in order to create an illusion among some group regarding its action, but we cannot dismiss the possibility that ITC commissioners might draw that conclusion.

A Noncynical Explanation of Inexplicitness. Reasoning that is more subtle, and not cynical, about congressional intent also arguably can lead to the conclusion that Congress might not articulate its underlying rationale in the statute. Causality, as noted above, is difficult to determine because the effects of the specified conduct must be separated from a myriad of other factors operating in the market. Congress might conceivably conclude that, if the subsidization or price discrimination in fact occurred and, during the same period, the fortunes of the industry declined, causality would be present in most instances. If this were believed, then the simple association in time of an "unfair" practice and declining domestic industry financial health could be deemed sufficient basis for relief despite the realization that the result under such an approach would be both over- and under-inclusiveness. In other words, some firms injured by other causes — and not materially injured by dumping or subsidization — would obtain relief, while other firms — whose fortunes had not in absolute terms declined, but who had been materially injured by dumping or subsidization that prevented them from doing much better — would be denied relief. Such an imperfect fit, if not too severe, might be tolerated if the costs of determining causality were sufficiently high.

This explanation, however, only goes so far as to explain why Congress might have adopted a solution that did not make the determination of causality an indispensable requirement for obtaining relief. What still must be explained is why Congress, if it were going to adopt such an approach, did not say so — as is manifest from the statute it did not — and, likewise, why it would have wished the ITC to implement these instructions without plainly saying what it was doing.[64]

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[64] Certainly, Congress has demonstrated its willingness to modify technical track requirements when it finds political (policy) interests disserved by existing law — or by interpretations of existing law. The 1974 amendment of the U.S. "escape clause" in Section 201 of the *Trade Reform Act of 1974* — which, among other things, deleted the requirement of a causal connection between trade concessions and poor industry health as a condition of trade relief — is an example. See S. Rep. No. 93-1298, 93d Cong., 2d Sess. 120 (1974).

While we can offer some partial, possible explanations, we are unable to answer this question convincingly. One element in the response must be that it is costly to prepare an explicit statute or good judicial opinion. But these costs are sometimes borne when sufficient benefits are perceived to be created. And, as noted above, systematic articulation by Congress and the agency would seem to yield such benefits in reduced agency costs.

A more promising avenue derives from our intuition that there is something — fooling aside — that makes express articulation by Congress and by its agents of some information less valuable as a means of reducing agency costs than articulation of most other information. Specifically, we find it plausible that Congress would obtain less benefit from articulation of the influence that it intends political factors to have — and from agencies' explicit and systematic incorporation of those factors in their opinions explaining enforcement decisions — than from similar articulation and explicitness with respect to "technical" factors.

Notwithstanding the promise of such a benefit-focused explanation, we have searched hard for this "something" and come up empty. What little we have to say is as follows.

We know of no reason why Congress would not wish to articulate to the agency whatever "deal" was agreed on with respect to the influence to be assigned political factors. In other words, Congress should want to convert "political" factors into "technical" factors. Perhaps, indeed, articulation of any unstated factor Congress wants considered is not of less benefit, but is simply more costly. But it does not seem likely that legislators could not agree on some general formulation of those considerations at tolerable cost.

Regarding Congress's desire for explicitness by the agency, the same conclusion seems to hold, but with one possibly important caveat. Given the alternative controls over agents, explicitness by an agency with respect to judgments that have not been reduced to technical criteria may in fact have less value for the congressional principal. Conceivably, with respect to political judgments, where no one has very good explanatory models, self-conscious articulation of the process by which the agency assessed the political factors would not be very helpful to Congress in deciding how well the agency had done its job. Perhaps people who make good political judgments operate largely on intuition as contrasted with the rigorous theory that can be brought to bear on issues of firms' behavior under specified conditions. Members of Congress can then learn little from what the agency says.

Whether the agency has complied with the will of Congress, moreover, can be determined not only by what it says but by what it does. If political judgments can be made intuitive, presumably legislators, using their own intuitive methods, will be able to determine how well the results reached by the agency accord with its own political preferences. That is especially likely if the politically desired result is framed in terms of keeping disputes from Congress' door. The measure of ITC success, from that perspective, is the infrequency of petitions for direct congressional involvement in efforts to secure trade relief or, perhaps more accurately, for formal congressional action on trade disputes. It is hard to construct a desired output for which monitoring costs would be lower.[65]

The remaining agency cost-reducing mechanism also increases the plausibility of congressional tolerance for agency inexplicitness regarding political judgments. In addition to monitoring output, Congress may also create structures that directly increase administrative incentives to behave as Congress desires. Several aspects of the ITC's institutional framework and composition suggest efforts to integrate political considerations directly into the agency's incentive structure.

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[65] We note that the more readily outcomes are evaluated the less likely it would seem that people will be fooled. See, for example, Holmstrom, "Moral Hazard and Observability."

The Commission is one of only two even-numbered, multimember government agencies in the federal government; with six members, no more than half from one political party. This appears to signal an expectation of political sensitivity as it does with the other even-numbered, bipartisan agency, the Federal Election Commission.[66]

The congressional effort to achieve political sensitivity by the ITC without monitoring the process through which political factors are taken into account is also evidenced by the fact that legislators have pressed for presidential appointment of commissioners who have limited professional experience of direct, apparent relevance to the ITC's mission but who have substantial connection to legislators. As a consequence, appointees include significant numbers of former congressional staff members, legislators, and lobbyists, all of whom are experienced in the political process. It is not, of course, accurate to say that, since they come from the political milieu and have been confirmed by Congress, they have perfectly internalized congressional preferences as to how political factors should be taken into account. But the notion that they have internalized self-enforcing incentives that will cause them generally to replicate political outcomes seems to have some force. At least as compared to other potential appointees, there is reason to believe that those who have worked with and for Congress will be faithful agents of Congress, even if they are not monitored. There is likely to be someone in Congress who will vouch that these people can be trusted to behave as Congress wants and, hence, there is less need for them to explain what they are doing.[67]

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[66] The political sensitivity of the Election Commission was reflected in, among other places, the decision of Congress to place appointment authority for four members of the Commission in the hands of congressional officers. See *Buckley v. Valeo*, 424 U.S. 1 (1975).

[67] We note that this explanation has force only as a relative proposition. Moreover, the ability to secure appointment for someone who supports or works for a congressman well may have benefits for that congressman...

Also in keeping with this notion are congressional efforts to insulate commissioners from competing incentives through the web of special provisions that separate the ITC from effective presidential influence. The Commission's budget, perhaps alone among federal agencies, goes to Congress without opportunity for comment at any stage by the President's Office of Management and Budget. Commissioners are selected for one nine-year term, removable for cause only after impeachment, and commissioners serving more than five years of a term are not eligible for reappointment. The President designates the agency chairman and vice-chairman, but the terms for these officers last only two years. The chairman and vice-chairman cannot be from the same political party, and the chairmanship must not be held twice in succession by members of the same party. The chairman must be chosen from among the sitting commissioners, but can not be either of the two most recently appointed. Extraordinary limitations on the chairman's power further reduce the significance of presidential authority over this selection.

The extreme steps taken to insulate against presidential influence perhaps reflect an expected asymmetry in presidential trade interests. The President may be thought systematically to be less inclined to impose trade restraints than the median legislator, given his general incentives to manage our foreign relations and the economy in ways that promote aggregate welfare. Insulation of commissioners allows ITC decisions to be brought more in line with the views of Congress, and thus provides another way to bring the agent's actions in line with the principal's interest.

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...independent of the expected quality of the decisions that person renders once appointed. This "joint product" characteristic of appointments makes it more difficult to deduce the substantive determinations expected of appointees from the source of their support.

Finally, the incentives for commissioners to behave as the Congress would like are improved by opportunities for signals from the legislature as to the right result in particular cases or the right mix of inputs — outside those contained in Title VII — to use as congressional views on trade issues change. These signals may be conveyed through statements at oversight hearings, appropriations decisions, actions on nominees to the Commission, inferences from amendments to the statutes administered by the agency or to related legislation, and communications from individual members of Congress — which, unlike quasi-judicial proceedings before many other agencies, are freely made in respect of pending cases.

Agency Problems in Sounds of Silence

The preceding section explores reasons, offered tentatively and uneasily, why ITC commissioners might believe that Congress, to fool people or for other reasons we have been unable to identify, has not explicitly included in the statute political factors that it nonetheless wishes the ITC to take into account. That section also addresses possible reasons why Congress does not wish the ITC to state that it has taken these factors into account. Although we cannot identify a persuasive reason why Congress would desire that the Commission be opaque, we have suggested bases for believing that the benefits of transparency may be less with respect to legislatively unspecified political factors than with respect to other factors. Congress might assure itself that the political factors have been taken into account by monitoring the results in ITC proceedings, choosing people who are likely to take them into account, and sending indirect signals to the ITC as to how well it is doing in taking these political factors into account.

The use of indirect, inexplicit signals, however, raises a different agency cost problem. It is important that these administrative agents not only be faithful, but that they be faithful to the right people. Various forces within Congress make this problematic. Legislation is, of course, most vigorously advocated by those who most strongly favor it, for whatever reasons. But, as the voluminous literature on representational government recognizes, it is the median legislator who governs the fate of legislation, by viewing the interaction of the value of a product to the marginal consumer — not the consumer who values the product most — with the producers' costs to set the market price. Thus, in a principal-agent model, it is the median legislator's views that should be taken to represent the view of the principal.

Yet, the median legislator is least likely to have incentives to monitor implementation of the legislation. In our context, it is the legislator most interested in trade relief who is most likely to provide frequent signals to the ITC. To the extent that signaling is through group action, by committees such as the Senate Finance Committee or the House Ways and Means Committee — or their International Trade Subcommittees — the most interested legislators will not be able to dictate the signal but will be more influential than when action must be taken by Congress as a whole.[68] Thus, the problem is a second form of "agency problem" focused on the ultimate agent's monitors: the median legislator should not trust colleagues to send the right signals — including selecting the right personnel for the ITC — unless the group of most interested legislators is expected to be comprised symmetrically of those intensely favoring and those intensely opposing relief, arrayed around the midpoint of legislative preferences.

In matters concerning antidumping and CVD cases, it is quite improbable that such balance will be achieved. While we postulate that legislators' interests respond to a complex mix of considerations, certainly the intensity of constituent interests expressed to legislators will play a significant role. The constituents most interested in importuning legislators to influence ITC decisions under Title VII, we predict, will be those to whom trade relief is most valuable but who fear that, under principled (technical) approaches, there is a significant likelihood that relief will be denied. This suggests that the political monitors of ITC performance are likely to depart systematically from the view of the median legislator and to favor more trade relief than the legislature as a whole intended.

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[68] On the dynamics of committee membership, see, for example, Kenneth Shepsle, *The Giant Jigsaw Puzzle* (Chicago: University of Chicago Press, 1978).

Legislators sharing that view should desire some means of controlling the consequent tendency one might expect of ITC commissioners to please the active legislative monitors by granting relief too freely. Judicial review of ITC antidumping and countervailing duty decisions, which at first seems out of keeping with a reading of the statute as preserving room for jury-like behavior by commissioners, may be seen as a counterweight to the one-sided influence of legislative monitors. If monitoring by individual legislators induces too great a tendency to depart from the statutory principle and give rein to political considerations not embodied in the statute, judicial review should serve to bring the Commission back into line.

The discussion above suggests that there may be a plausible basis for belief by ITC commissioners that congressional intent includes some margin for adjusting results in antidumping and countervailing duty cases in ways that look "political," although we do not believe a persuasive case on that score has been made. That belief presents the commissioner with two difficult tasks: finding out what is in fact intended in a world where explicitness has been ruled out — at least in the form of authoritative resolution in the text of the statute — and where the signals of congressional intent consequently are imprecise; and announcing decisions in a form that at once provides sufficient guidance to meet legislative interests that are integrated into the technical considerations contained in the statute, yet opaque enough to retain discretion to respond to political factors that can not or should not be stated clearly.

We remain troubled by the explanations offered here. Among other things, it seems a naive cop-out to suggest that the complexity of the process through which commissioners who wish to engage in one of these forms of "political fine tuning" must go — and the many rough judgments which must be made along the way — explain why commissioners are not eager to try to make explicit what they have done or Congress interested in having them try. Perhaps getting this tolerably right reflects a skill which the commissioners themselves are incapable of analyzing. They are like the successful entrepreneur who, at least consciously, understands neither marginal cost nor marginal revenue but goes on successfully equating the two. And — so the story goes — if the commissioners fail, Congress can spot that failure from their output and guide them back to doing what it wants.

Another story, however, could be told. The reasons we have been able to explain current practice are not very convincing. Someone who cares about how the legal system functions experiences a constant tension between "there must be powerful forces making it the way it is, so let's stop tilting at windmills" and "there must be some way to make it better." Perhaps our failure to offer a convincing explanation for what exists suggests that chance, inadvertent mistakes, and inertia play a significant part. If that is the case, and someone — taking the normative perspective we have so assiduously avoided — did not like what was now being done, he or she might take some comfort from our failure to show convincingly that it must be this way.

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A Comment: Judicial Review and Causation in Unfair Trade Remedy Law

John J. Barceló III

In their stimulating paper, Ron Cass and Warren Schwartz theorize that a majority of the International Trade Commission (ITC) refuses to follow a judicial model in deciding unfair trade remedy — antidumping and countervailing duty — cases and in writing opinions in such cases. They further posit that the ITC majority believes it is following Congress's will in doing so: Congress intends for the ITC (i) to decide cases on the basis of "political" factors not stated in the statute and (ii) not to admit this or even to explain its results in careful judicial fashion. The authors seem to have formulated these theories after observing that ITC opinions in this area do not conform to a judicial model; they lack clarity and analytical rigor, and are often obscure and conclusory.[1]

In the core of the paper, the authors actually explore not what the ITC *believes* about Congress's intent — which is the way they state the formal thesis — but rather whether they can offer plausible reasons why Congress might actually have the intent in question. They imply that if no good reasons can be found, then the ITC is probably wrong about Congress's intent and might be induced to change what it is doing. On the other hand, if convincing reasons are available, Congress may well be getting exactly what it wants from the ITC, and the ITC in turn will be less influenced by reasoned argument for change.

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[1] Some of the criticism in the paper of ITC opinions may not be wholly justified. For example, the authors take the ITC to task for inquiring into whether dumped or subsidized imports undersell domestic products. This very inquiry, however, is plainly required by the statute. See 19 U.S.C. Section 1677 (7) (C) (ii) (I) (1988).

Fooling Most of the People

The authors explore two possible explanations, one cynical and one noncynical, for the congressional intent in question. They believe that neither explanation captures the whole truth, although each seems plausible to them.

The cynical theory posits that Congress wants to fool either the general public or the United States' trading partners into believing that technical and legal factors determine when injury is found and relief awarded; whereas in reality, unarticulated political factors dominate the decision. The authors note that this is a version of the public-choice theory of legislative behavior, under which legislators pursue not the "public interest" but their own re-election by pleasing politically powerful constituents. The noncynical theory posits that Congress has not articulated the political factors it wants the ITC to apply, because to do so would be too costly or not truly efficacious. Both theories posit that Congress sometimes wants the ITC to give an industry relief, even though the relevant technical factors, if applied in a strict judicial fashion, would not justify it.

Of the two theories, the authors develop the cynical version more clearly. Under it, we can understand what political — nontechnical — factors might be intended to operate "behind the scenes." When a case involves an economically troubled domestic industry with political clout, one can imagine individual congressmen in the relevant districts wanting protectionist relief for the industry. One can further imagine congressmen wanting the ITC to do the politically sensible thing: "bend" or "fudge" the technical standards to award unfair trade remedy relief, without admitting that it is doing so. The authors are much less clear about what the political factors might be under the "noncynical" theory and how they might be intended to operate. If the dynamic just sketched for the "cynical" theory is also the basis of the "noncynical" theory, it is not easy to understand in what sense the theory is indeed noncynical. The vagueness with which the authors present the "noncynical" theory suggests that they have greater faith in the public-choice or "cynical" model.

This comment focuses upon two weaknesses in the public-choice or "cynical" theory: the challenge to the theory posed by Congress's providing for judicial review; and a logical inconsistency in the theory as applied to causation — because absence of cause essentially means the industry would not benefit from the remedy. In the end, I remain unconvinced that the cynical theory explains the poor quality of ITC opinions — at least regarding causation. As I will explain, the theory would have more plausibility for cases appearing to "fudge" the quantum of injury issue, because here a remedy would provide the industry with higher rents. Moreover, while perhaps failing on the smaller point of causation, the fooling thesis seems quite plausible on a larger point: as an explanation of the very existence of antidumping and countervailing duty laws — a theme, however, which is beyond the scope of the Cass and Schwartz paper.

Judicial Review

Standards of Review

For one weighing the plausibility of the fooling thesis, the most jarring feature of the U.S. law is its provision for judicial review. Although the authors acknowledge the inconsistency, they seem to undervalue the degree of contradiction. How is it possible for the reviewing courts to uphold ITC opinions that are as obscure and internally inconsistent as the authors describe them to be? At one point, they entertain the possibility that the ITC writes its opinions in such obscure fashion in order to avoid reversal on appeal. But that strategy would not work under the normal standard of judicial review, under which the courts have frequently reversed and remanded agency decisions when they are obscure, or inconsistent, or fail to respond to a relevant argument presented by the losing side.[2]

We are led to speculate either that the authors are exaggerating the degree of obscurity of ITC opinions or that the courts are approving incoherent decisions. I suspect the truth lies in between. No one could argue that ITC opinions are models of clarity. And it does seem that the reviewing courts — the Court of International Trade and the Court of Appeals for the Federal Circuit — are applying a surprisingly lax standard of review.[3] One wishes the authors had tried to explain why the courts are so permissive in these cases. They devote some attention to the absence of legal and economics expertise in the background of the typical ITC commissioner, to the way in which commissioners are selected, and to other factors suggesting that Congress wants ITC decisionmakers closely attuned to its political will. Yet these explanations seem actually to heighten the contradiction posed by judicial review. The judges involved in that review are as protected and as politically independent as any other judges. Why should they stand at attention and salute Congress's inarticulate political will? Or put another way, why would Congress be so solicitous of the political savvy of ITC commissioners yet at the same time provide for judicial review by independent, professional judges? And further, why do the professional judges in question actually approve obscure ITC opinions? The paper does not explore these conundrums.

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[2] See, generally, *Columbia Broadcasting System v. FCC*, 454 F.2d 1018 (D.C. Cir. 1971); and W. Gellhorn et al., *Administrative Law: Cases and Comments*, 8th ed. (Mineola, N.Y.: Foundation Press, 1987), pp. 426–436, 475–481.

[3] See, for example, *Algoma Steel Corp. v. United States*, 865 F.2d 240 (Fed. Cir. 1989), which allowed the ITC to find injury because of the effects of all imports — both dumped and nondumped — from a given source, and to refuse to consider the dumper's proffered evidence that dumped imports were less than 50 percent of the total. See also *Zenith Radio Corp. v. United States*, 437 U.S. 443 (1978), which required broad judicial deference to executive branch determinations of the existence of a subsidy under the countervailing duty law.

The Canada-U.S. Free Trade Agreement

Interestingly, one could point to the Canada-U.S. Free Trade Agreement for confirmation that at least the negotiators of that Agreement — particularly the Canadians — believe that judicial review offers an important leverage point in these cases. The Agreement provides for a unique binational panel review procedure, under which special panels comprised of Canadian and U.S. nationals will sit as a final review tribunal in all bilateral antidumping and countervailing duty cases.[4] The panels, and not the courts, will review ITC decisions and presumably will be free to reject and remand decisions that are not supportable on the technical considerations alone. Thus, the very inclusion of this procedure in the agreement implies that the Canadian negotiators, who apparently bargained hard for it, believe the fooling thesis.

The Agreement's binational review panels could provide an interesting laboratory to test part of the Cass-Schwartz thesis. If the authors and the Canadians are right, the specter of stricter review by binational panels could cause the ITC — and the Commerce Department, for its part of the procedure — to write clearer opinions and to resist affirmative decisions in cases weak on the technical merits, even if political factors point the other way. This could lead to a two-tier antidumping and countervailing duty law — just as is explicitly required in the Agreement for safeguard remedies:[5] one tier applying a stricter test of injury for bilateral trade, and a second applying a somewhat obscure, weaker injury test in all other cases. If such a *de facto* two-tier law is soon observable, it would lend support to the thesis that in most cases the ITC deliberately grants or withholds relief because of nontechnical, political factors.

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[4] Canada-U.S. Free Trade Agreement, Jan. 2, 1988, Articles 1901–1911; annexes 1901.2 and 1903.2. For U.S. legislation implementing the binational panel provisions of the Agreement, see *United States-Canada Free Trade Agreement Implementation Act of 1988*, Pub. L. No. 100-449, Section 401(c), 102 Stat. 1851, 1878-83, codified at 19 U.S.C. Section 1516a(g) (1988).

Causation and Fooling

Even if a two-tier law develops under the Canada-U.S. Agreement, I strongly doubt that it will operate in the area of causation.[6] The fooling thesis seems unpersuasive, even illogical, as applied to causation. I believe Congress intended a very lax causation test, under which causation exists if the remedy contemplated would help. Under such a test, it would be illogical for the ITC to give a remedy in the absence of causation.

One plausible version of such a test, which might at least approximate what the ITC actually does, would in more detail be as follows: causation of material injury in an antidumping case would be found whenever three conditions are met: i) the domestic industry is suffering material injury; ii) the volume of dumped imports is reasonably significant; and iii) the margin of dumping is reasonably significant.[7] Under counterfactual analysis — inherent in the causation issue — this test would ask how much additional revenue the domestic industry would have won had the dumper been forced to use his home-market price on sales to the United States. Causation would be found if this additional revenue would have made a material difference to the U.S. industry. The amount of additional revenue to be expected would be a function largely of the margin of dumping and the volume of dumped imports. In other words, the result of a significant price increase — the margin of dumping — on a significant number of imports — the volume of dumped imports — would tend to be a significant increase in revenues for the domestic industry.[8] I will refer to this test below as the "margin-of-dumping" test.

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[5] Canada-U.S. Free Trade Agreement, Articles 1101–1104. For the U.S. legislation implementing the bilateral safeguard provisions of the agreement, see *United States-Canada Free Trade Agreement Implementation Act of 1988*, Section 302, codified at 19 U.S.C. Section 2112 (1988).

[6] For brevity and simplicity, the discussion below deals only with the antidumping branch of the unfair trade remedy laws. Generally, the discussion is readily extendable to countervailing duty cases — although some adjustment in reasoning or analysis would occasionally be needed. For example, the authors' causation test in a countervailing duty case would obviously not involve a hypothetical flat price. Presumably, they would ask what price would have prevailed had the subsidy in question not been given. Under the approach suggested below in this comment, the margin-of-dumping test would become a margin-of-subsidy test, with appropriate adjustments.

The authors favor a different causation test — which I will call the "flat-pricing" test. They put the crux of their counterfactual analysis, in an antidumping case, as follows: "[I]t must be decided what price would have been charged in the United States if the firm had been constrained to charge the same price in the United States as it charged abroad."

This follows presumably because we are asking how the foreign firm would have behaved had it not discriminated in price — that is, had it been forced to charge a flat price. The flat price would have fallen somewhere between the higher home-market price and the lower U.S. price. After estimating the flat price, the ITC would ask whether the domestic industry would have been materially better off had the dumper charged the flat price instead of the lower dumping price. If so, causation would be found.

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[7] The first two parts of this test are generally reflected in ITC majority decisions. See, for example, *Calcined Bauxite Proppants from Australia*, USITC Pub. 2172, Inv. No. 731-TA-411 (Mar. 1989) (Final); *Dry Aluminum Sulfate from Sweden*, USITC Pub. 2011, Inv. No. 731-TA-411 (Mar. 1989) (Preliminary); and *Polychoroprene from France and the Federal Republic of Germany*, USITC Pub. 2233, Inv. Nos. 731-TA-446 and 447 (Nov. 1989) (Preliminary). The ITC does not appear to give distinct weight to the third part of the suggested test: the margin of dumping. This may be because a......finding of dumping by the Commerce Department — which precedes the ITC decision — means the dumping margin is more than *de minimis* and cannot be dismissed as insignificant. Nevertheless, I believe that a marginally low dumping margin and a marginally low volume of dumped imports could combine to produce a finding of no causation.

[8] It is, of course, possible that increasing the price of dumped imports would merely benefit other imports and not the domestic industry. This potential substitution effect should be included in the causation inquiry.

This is certainly a rational interpretation of causation in dumping law, and it has the virtue that it would probably lead to fewer injury findings than would the margin-of-dumping test in a field that is largely protectionist in any event. For reasons I will discuss, however, I doubt that this is what Congress intended. Unfortunately, the authors make little effort to explain why they believe their test is the best reading of the statutory language or of what Congress had in mind.

In fact, part of the U.S. statutory language contradicts both the above tests, because it suggests that the counterfactual causation analysis should be tied to the presence of the imports in the market and not to how they are priced. Under the statute, the ITC must determine whether "an industry in the United States is materially injured *by reason of imports* of that merchandise [that is dumped]."[10] Yet the statute in other ways suggests that pricing should be the crucial causation factor —that is, that one should ask what would have happened had the dumped imports been sold at a higher, nondumped price, and not what would have happened had they been excluded from the market altogether. First, as an express part of the causation test, the statute directs inquiry into whether dumped imports undersell U.S. products,[11] implying a concern for the imports' low price. Second, the undisputed purpose of the law is to deal with a pricing practice considered unfair: dumping. Thus, it is not the mere presence of the imports in the market, but the low price at which they are sold that makes them unfair — if they are unfair at all. Third, the remedy applied is a duty equal to the dumping margin — implying a desire to raise the U.S. price to the foreign market price — not total exclusion of the imports.

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[10] *Trade Agreements Act of 1979*, Pub. L. No. 96-39, Section 101, 93 Stat. 144, 162, codified at 19 U.S.C. Section 1673(2) (1988) (emphasis added).

[11] 19 U.S.C. Section 1677(7) (C) (ii) (I) (1988).

As the authors point out, the GATT language — especially in the Antidumping Code — clearly ties causation to the low dumping price and not the imports' mere presence in the market: "It must be demonstrated that the dumped imports are, *through the effects of dumping*, causing [material] injury."[12] But the authors do not show that this GATT language was intended to produce the kind of counterfactual analysis that underlies their flat-pricing test. It is hardly persuasive to urge a somewhat forced reading of a U.S. statute on behalf of consistency with an international agreement, which is itself at best ambiguous on the point.[13]

The authors presumably favor their flat-pricing test because it is consistent with market dynamics. They might argue that their test captures what a rational exporter would do if enjoined not to dump — not to discriminate in price. Such an exporter would be forced to choose a single price — the "flat price" — at which to sell both in its home market and in the United States. Flat pricing is also what a rational exporter would do if confronted with a positive antidumping duty order. Rather than pay the duty, the exporter would raise its U.S. price to the flat-price level and lower its home-market price to that level, because there would then be no price discrimination and, hence, no antidumping duty owing. By raising its U.S. price, the exporter would receive the scarcity rent from the higher price rather than pay it to the United States in the form of an antidumping duty.

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[12] General Agreement on Tariffs and Trade, *Agreement on Implementation of Article VI of the GATT*, April 12, 1979, Article 3, Section 4 (emphasis added).

[13] Indeed, one could cogently argue that the GATT Antidumping and Subsidies-Countervailing Duty Codes actually intended a weak causation test. Both Codes state an ordinary "causing injury" standard. See Ibid.; and idem, *Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the GATT*, April 12, 1979, Article 6, Section 4. This represents a distinct weakening of the causation standard stated in the original 1967 Antidumping Code, under which dumping was required to be the "*principal cause*" of material injury. See idem, *Agreement on Implementation of Article VI of the GATT*, June 30, 1967 (emphasis added).

But under the authors' flat-pricing test, the ITC would have to predict the likely level of the flat price — surely a speculative task. One might have expected Congress to have specified that step in the statute had it been intended. And there is a further difficulty. Under the statute, a flat price that falls below the "cost of production," as defined in the statute, would still be a dumping price. In effect, the statute takes as the home-market price either the actual price charged in the home market or the "cost of production," whichever is *higher*.[14] The Commerce Department makes the "cost of production" calculation — when relevant to its investigation — and under the statute that value may be somewhat artificially high.[15] Following the authors' approach, the ITC would not know whether the predicted flat price would be below the "cost of production" and, hence, not usable. Only if the flat price were equal to the foreign-market price could the ITC be assured that its flat price would not be a dumping price. Of course, the margin-of-dumping test that I think best reflects Congress's intent would use the foreign-market price for counterfactual analysis, and not the flat price.

There are several reasons for thinking the margin-of-dumping test corresponds better to what Congress intended in the statute. First, it would be a simpler, more straightforward approach, avoiding the complexities just mentioned. Second, it would hypothetically increase the price of imports to the "fair price," which is what the statute inferentially calls the foreign-market price. Finally, an increase to this "fair price" seems the aim of the ultimate remedy, an antidumping duty measured by the dumping margin, and not the gap between a hypothetical flat price and the U.S. price.

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[14] See *Trade Agreements Act of 1979*, Pub. L. No. 96-39, Section 101, 93 Stat. 144, 183, codified at 19 U.S.C, Section 1677b(b) (1988).

[15] The statute defines "cost of production" as fully allocated cost, not average variable cost, and adds in somewhat high profit and general expense amounts. See ibid., codified at 19 U.S.C. Section 1677b(b) and Section 1677b(c) (1988).

Curiously, however, under either interpretation of causation just discussed, the "fooling" thesis does not logically explain obscure ITC opinions concerning causation. The authors state their "fooling" thesis as follows: "It seems reasonable that Congress would find trade relief politically desirable in some instances where dumping or subsidization...do not *cause* [emphasis added] significant harm to a domestic industry." Suppose the margin-of-dumping test is used to define causation. Now under this test absence of causation would mean that the domestic industry would not benefit even if an antidumping duty were imposed. And if this is so, it is hard to see the political reward to Congress in having the ITC decide in favor of an antidumping duty that would not actually help the domestic industry.

The same result also follows even if one uses the authors' flat-pricing approach. Here, absence of causation means: had the dumper charged the higher flat price, instead of the low dumping price, the domestic industry still would not have received an additional revenue stream of any significance. This conclusion is equivalent, however, to saying that actual imposition of an antidumping duty would not have helped the domestic industry materially. This is because, as discussed above, the rational foreign exporter will not actually pay an antidumping duty, but will charge the flat price instead. Again, one must wonder why there would be a political reward to Congress in having the ITC decide positively on causation in such a setting.

This is not to say that the fooling thesis is out of place in ITC injury decisions. It would be consistent, for example, with a "fudged" decision by the ITC on the quantum of injury under the majority's bifurcated approach. Under that method, the ITC first analyzes whether the industry is experiencing economic distress — material injury — no matter what the cause. If economic distress is present, the ITC then asks whether dumping is a cause of the distress. Even if the industry were actually in good economic health, it would presumably still appreciate the higher rents it could earn from a positive antidumping finding that would push up the price of competing imports.

The most striking and significant "fit" for the fooling thesis, in my view, lies in its power to explain the very existence of antidumping and countervailing duty laws — a broader thesis than Cass and Schwartz attempt. Since GATT rules accept these laws, the "fooling" thesis would embrace the legislatures of most GATT signatories, or at least those that make substantial use of the unfair trade remedy laws. This broader thesis would posit that antidumping and countervailing duty laws actually function as surrogate safeguard laws providing relief against selective countries — instead of on a most-favored-nation basis — under soft injury standards, and with no obligation to provide compensation to or suffer retaliation from affected exporting countries. So far as I know, all careful and thoughtful analyses of antidumping and countervailing duty laws in recent years have concluded that these laws are inconsistent with liberal trade goals, and the claim of entitlement to relief because of "unfairness" in foreign dumping and subsidy practices is hollow.[16] Yet the claim serves well as a "fooling" device to shield the underlying protectionist purposes in the laws. If, in time, the false veil of unfairness loses its power to confuse or mislead and these laws are sharply curtailed or eliminated, the obscure ITC opinions that spawned the Cass and Schwartz paper will disappear as well.

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[16] See, for example, Michael J. Trebilcock, "Throwing Deep: Trade Remedy Laws in a First-Best World," in this volume.

A Comment

Gary N. Horlick[*]

Ronald Cass and Warren Schwartz observe that the U.S. International Trade Commission (ITC) decisions in antidumping and countervailing duty (CVD) cases "do not conform closely in several respects to generally accepted criteria for judicial decisions." Their hypothesis is that this lack of conformity reflects a conscious decision by ITC commissioners, and they ask why that choice has been made.

Cass and Schwartz point out that the Commission tends to rely on arbitrarily selected periods of investigation, without giving any explanation for the choice of time periods, and that it does not rely heavily on economic modeling in cases that, in theory at least, are "rich" in economic data.

One possible explanation of the nonjudicial nature of ITC opinions is that the ITC's procedures in antidumping and CVD cases do not conform to normal U.S. judicial models. Information gathering is by the ITC and its staff, rather than through an adversarial process. There is no serious testing of the accuracy of information by adversarial questioning. There is no serious discussion of the case among the commissioners themselves because of an ITC interpretation of the "sunset" provisions of U.S. law), and decisions are made prior to preparation of draft opinions. Nevertheless, this begs the question. The ITC conceivably could use more "judicial" procedures, as it does in Section 337 cases, which produce opinions quite comparable to those of the U.S. District Courts with which it shares jurisdiction over patent cases.[1]

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[*] The opinions expressed here are mine alone and do not necessarily represent the views of my clients or law firm, O'Melveny & Myers, Washington, D.C. I wish to note that the firm was involved in two of the cases cited by Cass and Schwartz, and thus I do not discuss specific cases in this comment.

Another possibility raised by Cass and Schwartz is that Congress wishes the ITC to issue obscure opinions, allegedly to hide the fact that ITC decisionmaking is based more on politics than on facts, or to hide the fact that the United States is "cheating" on the GATT. This allegation is belied — at least partially, and probably mostly or fully — by the ITC's track record. Whatever else has been said about the Commission, it has clearly rejected cases where Congress has indicated it would support approval. For example, in 1984 the ITC tossed out an antidumping and CVD case against imported European Community wine, on a point of law. Congress promptly amended the U.S. antidumping and CVD law specifically to permit the case to be brought again, and the ITC tossed it out again in 1985 in a preliminary phase. The same case was also the subject of a GATT panel decision against the U.S. law.

Finally, Cass and Schwartz hypothesize that the personnel composition of the ITC may explain the its objections to the judicial model of opinions. Most of the commissioners are appointed as a result of considerable pressure from congressional interests, and are not necessarily lawyers — indeed, at the time the paper was written, Vice-Chairman Cass was the only lawyer on the Commission, and there are none at present. As Cass and Schwartz point out, this may mean that Congress does not require a judicialized model, because it feels it can trust the commissioners — given the high degree of congressional involvement in their appointments. An alternative hypothesis is that people generally, at least in the United States, harbor a certain distaste or even dislike for lawyers and the legal profession, which in itself might account for rejection of a judicial model. Finally, the ITC's reviewing courts — the U.S. Court of International Trade and the U.S. Court of Appeals for the Federal Circuit — have increasingly specified what the ITC can and cannot deal with in its opinions. That influence, combined with the normal force of inertia, yields the type of opinions reviewed in the paper.

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[1] In addition, the Canadian International Trade Tribunal, administering antidumping and CVD laws with a considerable degree of similarity to the U.S. laws, employs far more judicialized and adversarial procedures.

The Antidumping Regulations of the European Community: The "Privatization" of Administered Protection

Patrick A. Messerlin

Introduction

This paper has three objectives. First, it describes the irresistible rise of the use of antidumping regulations by the European Community (EC), in less than 15 years, from insignificance to dominance in the EC protectionist arsenal. It shows that these regulations have provided unsurpassed means with which import-competing firms can appropriate trade policy, leading to its *de facto* "privatization".

Second, the paper examines how constantly expanding antidumping actions are sapping the world trade system by eroding the economic cornerstone of the General Agreement on Tariffs and Trade (GATT) — the nondiscrimination principle — and the political cornerstone of the GATT system — the tariff-binding process.

Third, the latest development — the anticircumvention, or "screwdriver", regulation — goes beyond trade flows, and introduces direct distortions in the world investment pattern. This section examines the two main "predatory" effects of antidumping procedures in these matters.

The paper accepts two points as starting blocks. First, Australian, Canadian, and U.S. antidumping regulations have the same effects as those described for the EC, although the impact of EC and U.S. regulations on the world trade system may be stronger because of the weight of these countries in world trade and in the multilateral trade negotiations. Second, economic analysis shows that "dumping" is a practice likely to hurt exporting countries and to benefit importing countries. Dumping, as a predatory practice, is a more costly and unlikely means to achieving the ultimate target of every firm — to enjoy the rents and leisure of monopolization — than the alternative means of mergers or collusions.[1]

The "Privatization" of Trade Policy

Protection has always been "private" in the sense that it is granted to private interests despite the welfare losses imposed on the importing country. However, antidumping regulations do more. By construction, they allow import-competing firms to choose the "right" cases — that is, the best opportunities to defend their views. As a result, ongoing antidumping cases tend to stretch the rules enforced in previous cases. This evolution, which contrasts with the idea of a code imposing stable disciplines, has led to a *de facto* "privatization" of trade policy.

Until 1977, EC antidumping cases were initiated at a very slow pace, roughly six per year. No clear pattern concerning the countries hurt by antidumping actions or the goods involved emerged from the stock of cases accumulated between 1970 — the year in which the EC's antidumping system began — and 1977. The first remarkable year was 1978, with an upsurge in cases to 83. However, 60 percent of these cases were concentrated in the steel industry, making it difficult to disentangle them from the Davignon Plan, which was building a fortress for the steel industry by piling up voluntary export restraints (VERs), minima prices, and marginal antidumping actions.

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[1] For a survey of the main results of the economic analysis of dumping, see Alan V. Deardorff, "Economic Perspective on Antidumping Law," in John H. Jackson and Edwin A. Vermulst, eds. *Antidumping Law and Practice: A Comparative Study* (Ann Arbor: University of Michigan Press, 1989).

Only in 1980 did antidumping regulations become a full-fledged instrument of EC trade policy. Since then, the EC antidumping system has been expanding in size and changing in nature, as shown by a comparison of three homogeneous periods, 1980–82, 1983–86, and 1987–89.

The 1980–82 Period: Testing the System

This first period is characterized by a well-defined pattern of countries and goods, as shown by Table 1, which lists countries and industries representing more than 10 percent of the antidumping cases initiated each year by progressive appearance and decreasing order.[2] The United States and Eastern European countries represent 60 percent of the cases initiated between 1980 and 1982. Basic chemicals and steel products were the main sectors involved, accounting for one-half of all cases. In sum, these three years were dominated by a few EC industries targeting a few foreign exporters.

This configuration suggests that, during this period, EC industries did not yet fully understand the potential of antidumping procedures. The illusion of a "code" stating stable disciplines had not yet evaporated, and the recently signed Tokyo Antidumping Code had had some positive effects, as illustrated by decisions that showed progress in terms of transparency compared with those taken during the previous decade: preliminary and definitive decisions were regularly published, names of complainants were more systematically

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[2] Listing countries or industries representing more than 10 percent of the cases reveals, by the same token, the protectionist bias of the cases, since very few countries and industries represent more than 10 percent of the EC's imports.

Table 1

European Community Antidumping Cases against Selected Countries and Industries, 1980–89

	First period			Second period				Third period		
	80	81	82	83	84	85	86	87	88	89
				Selected Countries						
United States[a]	1	2	1							
Czechoslovakia		1			[c]					
Poland		3								
East Germany		4	2				1			
Hungary		5								
Spain[b]				[c]	1					
Yugoslavia					[c]	1	2			4
Japan				[c]	[c]			1	2	3
South Korea								2	3	
China									1	1
Hong Kong										2
				Selected Industries						
Industrial chemicals	1	1	1	1	1		4		1	4
Machinery	2	2				7				
Sawmills	3				2	3				
Synthetic products		3	3			4	3	1		
Iron & steel			2			6	2	3	2	5
Nonferrous metal products				2						
Glass, glass products				3		1				
Metal products						2				
Cement, plaster						5				
Fertilizers							1			2
Electrical appliances							5			
Radios, TVs								2		3
Office machinery								4		
Spinning, weaving										1

[a] Includes Puerto Rico and the U.S. Virgin Islands.

[b] No case was initiated against Spain after its accession to the European Community in 1985.

[c] The cases against these countries were close to the 10 percent threshold.

Sources: *European Community Official Journal*; and author's own calculations.

provided, as were more detailed computations of dumping margins.

However, the built-in bias of the Code began to emerge. At the level of dumping determination, constructed values became the dominant method, increasing from 50 percent of the cases in 1980 to 74 percent in 1982, an evolution mainly resulting from cases associated with market economies.[3] At the level of injury determination, mere increases in import market shares became the accepted dominant criteria. This bias was progressively reinforced by the decrease in initial import market shares, from 24 percent on average in 1980, to ten percent in 1982; an evolution which — by definition — increases the size and frequency in import shares. Finally, "undertakings" — that is, voluntary export restraints granted by foreign exporters under the form of quantity or price fixing — became the dominant type of measures taken. As shown in Appendix Tables A-1 and A-2, undertakings represented 45 percent of the case outcomes, and undertakings combined with other types of outcomes approximated an additional 15 percent of the cases.[4]

The 1983–86 Period: Spreading and Twisting the System

The very different pattern of countries and goods of this second period mirrors the fact that EC lobbies have become aware of the capacities of the antidumping regulations. As shown in Table A-2, the 76 percent success rate — measured as the percentage of cases in which some type of action had been taken — was very high during the first period, particularly in two industries' extensive use of antidumping regulations: steel, 100 percent; and basic chemicals, 83 percent.

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[3] By contrast, the 1981 peak — 77 percent of the cases investigated were subject to constructed- values methods — was due mainly to the large number of cases against nonmarket economies in that year.

[4] In the EC antidumping regulations, various outcomes can be taken for foreign exporting firms, even from the same country.

Spreading the System

Although the basic chemicals and steel industries remained the dominant users of antidumping actions during this second period, three totally new industries — glass, cement, and office machinery — became active. Four others — nonferrous metal products, metal products, fertilizers, and spinning and weaving — significantly increased the number of antidumping complaints lodged.

Interestingly, such a diverse range of complainants led to a much more marked spread of the foreign countries concerned. During this second period, the spread was so large that no country emerged as systematically "targeted" — by contrast to the United States and Eastern Europe in the previous period.[5] Countries not involved during the previous period — Japan, South Korea, and Mexico — began to be caught in cases. However, there was some bias against "newly industrialized" countries, particularly those close to the EC, such as Spain, Yugoslavia, and to a lesser extent, Turkey.

Twisting the System

Much additional bias emerges at all levels of the procedure.[6] The best illustration of the "flexibility" of the regulations regarding dumping determination is given by the treatment of the rate of profit to be considered in the estimates of the exporters' costs. In the "electronic typewriters" case — a decision taken at the end of 1984 — the Commission revised its estimate of the profit rate, and substituted a 32 percent rate in the definitive decision for the ten percent rate estimated in the preliminary decision. This "adjustment" occurred because the antidumping office decided to base its estimate on one Japanese submarket — the sales in Japan of like products exported to the EC — which involved only three out of eight Japanese producers. This submarket was less competitive than the global Japanese market, and a boost in profit rates resulted. On the injury side, shrinking domestic markets became the dominant criteria: a bias that allowed the antidumping office to overcome the decreased import market shares during the previous period. Undertakings — minimum prices agreed by foreign exporters — became the standard outcome. Economic analysis suggests that minimum prices are more protectionist than quotas in cases of decreasing demand.[7]

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[5] The Herfindahl concentration index of cases in terms of countries decreased by half between the two periods; whereas the Herfindahl concentration index of cases in terms of industries remained stable.

[6] Among the first to reveal some of this bias was Christopher Norall, "New Trends in Anti-Dumping Practice in Brussels," *The World Economy* 9 (1986). For a detailed indication of how the procedures for cost estimates and negative dumping margins are "asymmetrical", see Jean-François Bellis, "The Reform of the GATT Antidumping Code: 'Symmetry' and Negative Dumping" (Free University of Brussels, Institute of European Studies, 1990, Mimeographed).

However, the most important twist in the system may have come from the nonenforcement of provisions in the EC regulations that could have worked as counterbalances to the "privatization" of antidumping regulations. The most important of these "missed opportunities" is analyzed later in the paper.

The 1987–89 Period: The "Great Drift"

During this third period, the EC antidumping system changed its nature and size. The industry complainant structure confirmed the spread of the previous years, with the emergence of a strong third pole of complainants in the electronic industries — radios, televisions, and office machinery — in addition to the two initial steel and basic chemicals groups. This evolution had a dramatic impact on the reemergence of "targeted" Asian countries: Japan, South Korea, China, and Hong Kong, representing more than half the cases initiated from 1987 to 1989.

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[7] See Patrick A. Messerlin and Federico Chaganaqui, "The Uruguayan Reference Price System" (World Bank-UNDP External Trade Program, 1990, Mimeographed).

This period was marked by a major extension of the protectionist impact of antidumping regulations. First, there was a massive use of duties. In 1987, the only year of the period for which almost all outcomes are known, duties represented 70 percent of the restrictive outcomes and 80 percent of those against newly industrialized countries. Moreover, recent antidumping decisions make clear that antidumping duties can be imposed on goods under quotas or VERs — with specific mention of the Multifibre Arrangement in textiles, thus opening perspectives to a wide array of industries.

Second, "cumulation" is used to such an extent that countries have been caught in cases only because they were exporting allegedly dumped goods, and not producing them, as best shown by the 1989 cases against Hong Kong.[8] Dumping by Hong Kong firms is unlikely because the low protection granted to Hong Kong industries minimizes the opportunities to ban "arbitrage" — dumping requires the absence of arbitrage — and because Hong Kong's domestic markets are small relative to its trade-dominated markets. Such a use of "cumulation" deserves two comments. First, it reduces the opportunities of re-export — that is, the usual economic means of reducing dumping — since it enhances arbitrage. Second, it allows expansion of antidumping actions in a way very similar to the "screwdriver" regulation.

Finally, the 1988 version of the basic antidumping regulations deserves some attention because it introduced many additional biases. The best illustration is provided by the

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[8] For instance, in the silicon metal case, the complaint specifies that prices of Hong Kong exports should be compared to prices in a reference country, as would any export from nonmarket economies. The United States was suggested as the reference country.

"anti-absorption" clause, by which foreign exporters are obliged to increase their export prices by the full percentage of the antidumping duties imposed — a major point when one takes into account the drift to more duties as observed during the third period. This provision is equivalent to a minimum price scheme without giving to the foreign exporters the rents usually associated with such a scheme. It represents a major protectionist drift, particularly when all the biases in establishing dumping and injury margins are taken into account.[9]

The Sapping of GATT Principles

The main benefit of the "liberal trade" system introduced by the GATT is to ease the entry of new exporters to foreign markets. The GATT principles adopted for this purpose are nondiscrimination and tariff binding. Nondiscrimination allows newcomers the same treatment as current exporters. Tariff binding eases entry by reducing the gap in terms of information and appraisal between existing exporters and newcomers on the level of protection (the tariff ceiling) and its economic impact (the use of tariffs instead of quotas).

The EC antidumping regulations are sapping nondiscrimination by the high degree of selectivity they allow. They are sapping tariff binding by adding to tariffs antidumping duties so high that bound tariffs become meaningless.

Selectivity versus Nondiscrimination

That antidumping procedures are equivalent to a selective safeguard is now a well-accepted fact. Indeed, antidumping actions can be much more selective than safeguard procedures because they can define alleged dumpers not only at the

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[9] As documented by Brian Hindley, "Dumping and the Far-East Trade of the European Community," *The World Economy* 11 (1988).

Table 2

Selectivity versus Nondiscrimination: The European Community's Use of Antidumping Protection

	Market shares held by allegedly dumped imports[a]						
	0–1%	0–2%	0–5%	0–10%	0–25%	0–50%	0–100%
Percentage of cases[b]	23.2	35.8	55.8	71.6	89.4	96.8	100.0

[a] Market shares are defined in terms of the European Community's total domestic consumption.

[b] The total number of cases is 95.

Sources: *European Community Official Journal*; author's own calculations.

country level — during the Tokyo Round, the EC wanted to introduce such a selectivity in the framework of GATT Article XIX — but also at the firm or subsidiary level.

The high degree of discrimination against newcomers is illustrated by Table 2, which gives the distribution of antidumping cases by the share held by foreign exporters in terms of total EC consumption. In almost one-quarter of the cases for which observations are available, alleged dumping countries were holding less than one percent of EC consumption.[10] The number of dumpers drops to one-third if the threshold of EC consumption is two percent, and to one-half if the threshold is 5 percent. Interestingly, there is no substantial evolution of the unweighted average market share — approximately nine percent of the EC total domestic consumption — between the three main periods.

Selectivity is not only sapping the nondiscrimination principle, but it is also inconsistent with an economically sound concept of injury. The causal relationship implied by the injury concept requires an antidumping action to establish the impact of the injury on each "dumper" and to impose antidumping measures only on the "dumped" imports having the injurious effect. That A and B dump exports in the EC does not imply necessarily that both A's *and* B's exports are injurious; and it does not necessarily imply that if A's exports are restricted, B's exports will still be injurious. Such an argument has been considered in only a few EC antidumping cases at the country level and never, it seems, at the level of firms exporting from the same country. Indeed, the latest version of the EC antidumping regulations precludes the possibility of the argument.

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[10] These figures are based on observations available for cases initiated between 1980 and 1985 that were terminated between 1980 and 1988.

The Erosion of the Tariff-Binding Rule

The political cornerstone of the GATT mechanism is the tariff-binding method. That tariffs cannot be higher than a threshold has a great price because it reduces the level of uncertainty for economic decisions. This value has been increased because trade liberalization under the GATT ægis has led to low bound tariffs in most of the industrial countries.

The GATT approach did not submit antidumping duties to the tariff-binding discipline because it conceives such duties as a compensation of alleged unfair price differences. However, the many biases introduced in the enforcement of antidumping regulations means that — even when one accepts the rationale for antidumping regulations — antidumping duties are *de facto* equivalent to additional tariffs.

As a result, it is necessary to compare the most-favored-nation (MFN) tariff rates granted by the EC and the *ad valorem* equivalents of antidumping restrictive outcomes for the same products. In order to avoid the difficult problems of estimating *ad valorem* equivalents of undertakings, Table 3 provides such a comparison based on the antidumping duties for 36 cases concerned. Three main results can be drawn from the table. First, antidumping duties are on the average three to four times the MFN tariff rates, and six to seven times the *de facto* average

Table 3

The European Community's Use of Antidumping Protection versus Tariff Binding

	MFN tariffs *(a)*	**Applied tariffs** *(b)*	**Antidumping duties** *(c)*	**Ratio** *(c)/(a)*	**Ratio** *(c)/(b)*
All countries	*7.3*	*4.2*	*26.0*	*3.6*	*6.2*
Industrial countries	7.3	5.2	16.6	2.3	3.2
Less-developed countries	7.1	3.0	28.2	4.0	9.3
Newly industrialized countries	6.1	3.0	22.6	3.7	7.5
Nonmarket economies	7.8	4.4	37.2	4.8	8.5
1980–82	8.0	5.1	35.0	4.4	6.9
1983–86	7.7	3.9	21.7	2.8	5.5
1987–89	4.4	2.7	16.7	3.8	6.2

[a] Averages of the most-favored-nation tariffs.

[b] Averages of the import-weighted averages of tariffs applied to each good.

[c] Averages of the antidumping duties.

Sources: *European Community Official Journal*; author's own calculations.

applied tariff rates. Second, the erosion of the tariff-binding principle in cases involving industrial countries is lower than the erosion observed in cases involving developing countries and newly industrialized countries, and almost half the erosion in cases of nonmarket economies. Third, available cases show that, after a decrease during the second period, the discrepancy between the antidumping duties and the bound tariffs — or the average applied tariffs — has been increasing again since 1987.

Finally, Table 3 gives one more piece of information on the selectivity issue by providing the average number of different duty rates by country involved in these 36 cases. Selectivity is highest among the industrial countries, with an average of seven different duties by exporting country. This figure mirrors the Japanese cases, which involve, on average, a dozen firms.

"Missed" Opportunities

There were two major opportunities to counterbalance the protectionist drift of the EC antidumping regulations by enforcing clauses that could have reversed, or at least minimized, protectionist drift: the "competition" clause and the "interest of the Community" clause.

The Competition Clause

The 1968 antidumping regulations mentioned the existence of "restrictive trade practices" as one of the factors to be considered when looking at the injury. Despite its loose formulation, this "competition" clause disappeared in the subsequent antidumping regulations. Considerations on competition do not abound in antidumping cases.[11] There is a wide range of EC-specific reasons for the ignorance of competition issues — and the tension between antidumping regulations and anticartel laws. Jacques Bourgeois has developed three aspects: legal — competition rules apply only to the conduct of undertakings, not to the Commission or Council acting in a regulatory capacity; institutional — the relative bargaining powers of the antidumping and competition offices; and "social" — the devoted cooperation of firms to antidumping procedures and the dramatic fights against competition laws.[12]

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[11] There is only one antidumping case — glycine against Japan — where competition issues have been explicitly taken into account, with the imposition of duties of the same level to the two Japanese exporters, despite different dumping margins.

[12] Jacques Bourgeois, "Antitrust and Trade Policy: A Peaceful Existence," *International Business Lawyer* (February, March 1989).

However, it is becoming clear that the cost in lost competition resulting from antidumping actions is high for three reasons.[13] First, cartels too weak to impose their own disciplines were using antidumping actions as implicit collusive devices and, as a result, they were having recourse to some kind of public support for monitoring their collusion. In other words, the economic impact of antidumping measures is the compound of protection and collusion. Second, approximately one-quarter of the antidumping actions initiated since 1980 have played such a role to a various extent. Third, cartels have proven to be skilled in using the various loopholes and biases of existing antidumping regulations for winning their antidumping cases. Examining the recent anticartel decisions by the Commission competition office on two basic chemical industries provides strong evidence of "rules", for assessing dumping and injury, which cartels have been able to capture, and of restrictive outcomes — such as undertakings — which have been equivalent to cartel disciplines.

The "Interest of the Community" Clause

The EC antidumping regulations contain a clause that allows the Commission and the Council not to take action — even if there is dumping and injury — if it is in the "interest of the Community." By taking into account the economic impact of protection on the rest of the economy, this clause may be seen as a weak form of the negative welfare effects of protection on the EC consumers, or users in the case of intermediate goods.

During the first period, the clause was enforced a few times as a user clause. However, after the 1983–84 period, the clause was rejected and/or quoted negatively. For instance, in the "electronic typewriters" case against Japan (1984), the antidumping office took care to mention that "this point [an unavoidable price increase and decline in competition in a case of restrictive measures] was not raised by any consumers but by the Japanese exporters and their related importers."[14]

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[13] Patrick A. Messerlin, *Antidumping Regulations or Procartel Law? The EC Chemical Cases*, World Bank International Economics Department Working Paper Series 397 (Washington, D.C.: World Bank, 1990).

Since 1986, the interest of the Community clause has undergone a last mutation. The clause has been captured by producers to such an extent that it is interpreted as meaning the "strategic" necessity of retaining at least one EC producer, or even the "necessity" for the long-term interests of the EC consumers of maintaining EC producers — a sad paradox. In the recent "synthetic fibers" case, the decision specifies under the interest of the Community clause that "the price advantage which certain users enjoyed previously [before the antidumping duties] was derived from unfair practices and they have no permanent rights to retain advantage."[15]

Antidumping Regulations as "Predatory" Practices

Economic analysis sees trade liberalization as a way of decreasing the relative costs of getting some goods (imports) — a terms-of-trade effect that has little to do with growth. However, there is strong evidence that trade can free dynamic forces and thus be an engine of growth if the right macroeconomic and institutional conditions prevail.[16] The crucial link between trade and growth is international investment.

Antidumping actions tend to distort the link between trade and growth in two ways. First, they distort international investment flows, in the long run "raising the rivals' costs,"[17] by creating incentives to overinvest abroad with more expensive investments in countries with less comparative advantages. Second, they create incentives for "opportunistic behavior" on existing outward-oriented investments. In this case, they distort trade flows and rates of return in a more transitory way, though the repetition of opportunistic actions is likely to generate distortions in the international investment pattern in the long run.[18]

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[14] *European Community Official Journal*, L163, June 22, 1989, p. 9.

[15] *European Community Official Journal*, L348, December 17, 1988, p. 54.

[16] See Anne O. Krueger, "Importance of General Policies to Promote Growth," *The World Economy* 8 (June 1985).

[17] See S. Salop and D. Scheffman, "Raising Rivals' Costs," *American Economic Review* 73 (1983).

The "Anticircumvention" Regulation: Raising Rivals' Long-Run Costs

In 1987, the EC adopted the "screwdriver" procedure aimed at limiting the circumvention of antidumping duties on final goods by foreign — in fact, Japanese[19] — firms through increased investments in assembly plants. In 1988, the United States adopted a procedure aimed at a similar goal. Both Australia and Canada have *de facto* acted against circumvention since then.[20] Seven anticircumvention cases have been initiated by the EC Commission, most of them in electronics: typewriters, scales, excavators, photocopiers, ball bearings, printers, and video cassette recorders.

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[18] In both situations, small exporters are likely to be hurt more than large firms; another illustration of the discriminatory impact of antidumping actions.

[19] The seven EC anticircumvention cases deal with Japanese firms. As a result, reference is made to Japan in order to simplify the arguments presented here.

[20] For a description of the legal details of the EC anticircumvention provisions, see Jackson and Vermulst, *Antidumping Law and Practice*; and Edwin Vermulst, "The Reform of the GATT Antidumping Code: Circumvention" (Free University of Brussels, Institute of European Studies, 1990, Mimeographed). The U.S. and EC legal procedures are quite different. The U.S. procedure is based on the appraisal of the importance of the extra value added through assembly, which seems less likely to generate as many legal problems as the EC procedure based on the "content" approach.

From an economic point of view, circumvention is a well-known problem in developing countries. Circumvention is invariably related to high tariffs, as fiscal fraud is to high taxes. Indeed, one could argue that the EC anticircumvention procedure was born from the very high success rate of the anti-Japanese lobbies in the mid-1980s in "regular" antidumping cases. The lobbies were so successful in getting drifts in the rules enforced — unfair treatment of exporter costs and profits, as shown above — in antidumping procedures on these final products, that high antidumping measures, on average from 15 percent to 25 percent, were imposed on these goods. These huge increases in antidumping duties left one route open to the Japanese firms concerned — to invest outside Japan — in order to maintain these large sales.

It is important to note that one could deal with the circumvention issue by enforcing antidumping procedures on parts imported in the EC assembly plants, or by enforcing customs classification rules on final products that Japanese firms import from non-Japanese sources — that is, by enforcing existing rules. The usual argument against the first alternative — there are too many parts to be investigated, 1,000 in a photocopier — is not convincing. Few essential parts constitute the bulk of the value of the machines, such as engines and gear boxes for cars, so this first alternative would be quite manageable. However, the power of the lobbies involved in the cases against Japanese firms — mainly electronics and machinery firms — led to an *ad hoc* regulation, generating many new problems as shown below, and again illustrating the protectionist drift of antidumping regulations.

From an economic point of view, the anticircumvention regulation has three main effects. It dramatically increases the obligation to overinvest outside Japan, a trend which the regular antidumping procedures have begun to generate. It increases the costs of investing abroad for the Japanese firms. It distorts the world pattern of investment. In sum, the anticircumvention regulation has one goal: to raise rivals' costs. As a result, it tends to be more costly than "regular" antidumping duties because it burdens the consumer with additional costs on the production side, related to imposed resource allocation inefficiencies.

Increased Incentives to Overinvest Outside Japan

It is easy to understand that the anticircumvention regulation increases the incentive for Japanese firms to invest abroad. But the extent of the distortion in the investment pattern is often understated and deserves some attention.

The first-best investment efficiency for Japanese firms would be to invest in Japan and to export to the EC under the regular EC tariffs — that is, before antidumping procedures are initiated against the final products. The high antidumping duties on these final products lead to a second-best choice of investing in the EC more than would be optimal (say, zero, initially). Assembly plants minimize the decline in both Japan's welfare, because additional investments are kept minimal, and in the EC's welfare, because Japanese parts are assembled in the EC at a comparable cost to assembly in Japan. This second point deserves some emphasis. Minimal Japanese assembly plant investment in the EC and strong competition between the Japanese firms producing in the EC may be a situation close to the initial one.[21] In other words, it is wrong to say that the benefit to the EC from such investment was minimal because the value added locally was low. Perhaps EC employment was not boosted by these limited investments, but EC consumers may have enjoyed a welfare close to that existing before the antidumping actions on the final products.

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[21] However, the National Consumer Council suggests that prices have increased as a result of antidumping actions. See National Consumer Council, *Consumer Electronics and the EC's Antidumping Policy*, International Trade and Consumer Working Paper 1 (London, 1990).

However, the anticircumvention regulation imposes an investment greater than mere assembly plants: it generates a third-best situation. How strong is the regulation impact? This can be estimated by looking at the way the anticircumvention duty is computed for a Japanese firm operating an EC plant with parts of both Japanese and non-Japanese origin. The anticircumvention duty on the final good equals the product of the antidumping duty on the final good imported from Japan — as determined in the initial antidumping action — and by the share of the parts of Japanese origin in the total value. For instance, if the antidumping duty on the imported good is 20 percent, and the parts of Japanese origin represent 80 percent of the total value — two likely figures for the goods involved — then the anticircumvention duty on the final assembled product is 16 percent. In other words, the high cost in terms of duties suggests a strong impact for the anticircumvention regulation.

In summary, the EC anticircumvention regulation is the outcome of a spiral in inefficiencies: high initial antidumping duties generate strong incentives for Japanese firms to establish assembly plants, and these firms, in turn, are under pressure to overinvest in non-Japanese parts because of the EC anticircumvention regulation.

Additional Costs of Investing Abroad

The anticircumvention regulation not only requires overinvestment outside Japan, but it also imposes additional costs on the Japanese firms obliged to invest abroad. Before looking at these costs, it is worthwhile to note that the first effect is an increase in the demand for foreign investment by Japanese firms, and the second effect represents a shift in the supply of foreign plants as shown below. The combination of the two effects leaves no doubt about the resulting "price": it will increase. Moreover, it might be possible that in such circumstances the total investment of the Japanese firms at the world level — Japan plus the EC — is *lower* than it would have been without the anticircumvention regulation. The EC lobbies are certainly pleased with such an outcome. Taking into account that Japanese firms are the most efficient manufacturers of the products concerned — and are likely to continue to be so for a long period — demonstrates a welfare loss at the world level.

The additional costs on the supply side come from two main sources: uncertainty about the wording and intent of the regulation, and contradictions in its enforcement.

First, all practitioners and lawyers agree that the EC anticircumvention regulation is loosely written, to say the least. For instance, the EC antidumping office used two different methods of determining the origin of parts — the core of the procedure — in less than two years (September 1987 to July 1989), and a third method is not excluded in the near future. After seven cases, agile practitioners are still not able to understand fully how the EC origin may be granted in some cases.[22]

Second, additional costs are incurred because the two methods of determining the parts origin are different and, accordingly, have generated time inconsistency in the investment strategies of Japanese firms.

The first method is based on the nationality of the parts manufacturer in the EC. Japanese firms have a strong incentive to subcontract parts production, because "subassembly" costs — occurring when parts of different origins are assembled in order to get an intermediate part — are added to the value of non-Japanese parts, but not if the production is done by Japanese firms. In other words, the non-Japanese value will be increased by the subassembly costs — for the same proportion of parts of Japanese and non-Japanese origin — if the producer is accepted as "independent" from the Japanese exporting firm. If one believes the hypothesis that the competitiveness of Japanese firms is closely related to corporate vertical links and group relations, then the first method has introduced incentives to limit vertical integration and is therefore welfare reducing.

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[22] Vermulst, "The Reform of the GATT Antidumping Code: Circumvention," p. 12.

The second method, adopted in the 1988 photocopier case, modifies the first method by introducing the criteria of the production process. If the intermediate part can be taken apart without destruction of any of the subparts, then the first method is still valid. However, if the intermediate part cannot be taken apart without destroying a subpart, the intermediate part is considered a single part and obeys criteria of the new method, which evaluates the part as the sum of the parts of non-Japanese origin and the subassembly costs. In other words, the second method reduces the market-structure distortions introduced by the first method — incentives to subcontract — but creates technological distortions by generating incentives to substitute single parts with subassembled intermediate parts.

Moreover, both methods are based on a flagrantly unfair treatment of the subassembly costs. If the Japanese firm operates in Japan, these costs are included in the value of the parts imported. If the same production operation is undertaken in the EC, these costs will be included only if the producer is independent — in the case of a subassembly based on screwing — or if the subassembly is a single part.

Distortions of the World Investment Pattern

As mentioned above, the EC regulation considers Japanese versus non-Japanese origin, so Japanese firms can invest or expand their facilities in third countries, such as the United States or the Asian-Pacific region.

This distinction is impossible, because the anticircumvention regulation was legally designed as a local-content regulation that would not distinguish between parts of EC and non-EC origin. However, reading the actual anticircumvention cases leaves no doubt about the local-content equivalent of the enforcement of the EC anticircumvention rule. References to "EC-origin" abound. Moreover, it is hard to believe that undertakings granted in a circumvention case do not contain requirements for the EC origin of some parts. This is implicitly acknowledged by practitioners.

In the recent past, Japanese firms have used the Japanese/non-Japanese distinction and have increased their investments and production outside Japan and the EC. However, recent data suggest that these investments may well be under threat, not from the anticircumvention procedure, which requires investments within the EC, but from the normal origin rules. Imports of ballbearings from Thailand and electronic typewriters from Taiwan, for example, were subject to two investigations in order to assess whether these products could be considered as Thai or Taiwanese. More recently, imports of Ricoh photocopiers from the United States were subject to the same question, with the remarkable element that the intervention in Ricoh's California plant was not the fact of the antidumping office (Directorate General I), but of the Customs office of the Commission (Directorate General XXI).

The resulting intricacies between all these regulations add more confusion and uncertainty to the situation. As Edwin Vermulst suggests, there is a tradeoff between anticircumvention rules and rules of origin that is impossible for international investors to assess properly, since both sets of "rules" are stretched by the circumstances; there is also the additional problem that customs in the EC are still under national administration, with the divergence of attitudes that implies.[23]

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[23] See ibid.

Antidumping Regulations as Generating "Opportunistic" Behavior

Regular antidumping regulations may also impose distortions on investment patterns, as shown by the following example. Suppose that a Canadian firm invests in a new plant designed mainly for a large, well-defined export market, such as the EC, in order to achieve all the gains from scale economies. Suppose also, for the sake of simplicity, that the sole EC producer of this product does not export and uses a relatively inefficient old plant to serve the EC market. In order to avoid competition and losing market shares and profits, the EC firm lodges an antidumping procedure leading to an antidumping duty. The EC market is important for the Canadian plant's profitability if there is no way to sell its excess production in non-EC countries, and the Canadian firm is therefore hurt by the action.

As a result, the value of the Canadian firm's assets may drop substantially. At the same time, the EC firm may still be profitable because of the extra protection it receives. The final outcome of these two evolutions is that it is very profitable for the EC firm to buy the Canadian plant or firm if the antidumping duty can be repealed. The EC firm buys the Canadian assets at an artificially depressed price, because as soon as exports from Canada to the EC resume, the full rate of return of the plant and the profitability of the Canadian firm will be restored. Future profits will easily pay for the old EC plant to be scrapped.

This scenario requires one condition: the repeal or the expiry of the existing EC antidumping action. This condition is easy to meet if the EC complainant is a monopoly, as in the example above. With several complainants, the situation may be more complex, but not unmanageable. One might be prepared to believe that several EC antidumping cases are not inconsistent with such a possibility.

Conclusion

The first section of this paper showed that the evolution of EC antidumping regulations is so complex that one may conclude there is no such thing as antidumping rules *per se*, but, rather, a constantly expanding instrument biased toward protection. The second section described the negative impact of such "evolving" regulations on the GATT principles of nondiscrimination and tariff binding. The third section spelled out the large negative welfare effects of the anticircumvention "screwdriver" regulation. As a result of these three evolutions, antidumping regulations in the EC have led to the "privatization" of trade policy in the three main industries of steel, chemicals, and electronics.

This privatization process has a strong impact on the Uruguay Round negotiations, as best illustrated by the EC's reluctance to suggest the future introduction of EC clauses — such as the "interest of the Community clause" — that would help to resist the protectionist drift of antidumping actions. Moreover, the EC and the United States have become strong supporters of concepts such as "recidivist dumping", which expand the coverage of antidumping actions. Both economic analysis and evidence drawn from antidumping cases — the high degree of capture of the antidumping procedures by cartels in formation — suggest that the concept of "recidivist antidumping" would be more appropriate.

The *de facto* coalition of the EC and the United States for expanding the coverage of antidumping matters by introducing new concepts may create a dangerous situation for two reasons. First, some countries may feel that they should agree to the introduction of such new concepts as anticircumvention rules in order to have stricter disciplines in "regular" antidumping rules. Such a tradeoff seems, however, very risky when the "stretching" capacity of antidumping regulations under the pressure of the day-to-day cases is taken into account. Second, stricter disciplines in antidumping actions may lead to more hidden ways of achieving the same result. The possibility of using U.S. antitrust laws against U.S. subsidiaries of foreign firms "guilty" of restrictive practices in their domestic overseas markets is ominous.

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Table A-1

European Community Antidumping Cases for Selected Countries, 1980–89

	Restrictive outcomes*(a)*					Non-restrictive outcomes	Total *(b)*	Unknown outcomes	Total *(c)*	Shares in initiations	Restrictiveness ratio *(d)*
	VERs	Duties	Under	Mixed	Total						
						1980–82					
Developed	1	2	17	12	32	9	41		41	31.5	78.0
Japan	1		3		4	1	5		5	3.8	80.0
United States[e]		2	6	11	19	5	24		24	18.5	79.2
Eastern Europe		7	29	8	44	10	54		54	41.5	81.5
Czechoslovakia		1	8	2	11	2	13		13	10.0	84.6
East Germany		4	5	1	10	2	12		12	9.2	83.3
Hungary			2	1	3	4	7		7	5.4	42.9
Poland			5	1	6	1	7		7	5.4	85.7
Romania			6	1	7		7		7	5.4	100.0
NICs	2	4	8	3	17	8	25		25	19.2	68.0
Spain		1	2		3	2	5		5	3.8	60.0
Turkey			1		1		1		1	0.8	100.0
Yugoslavia		1	2		3	1	4		4	3.1	75.0
Mexico											
Hong Kong											
South Korea						1	1		1	0.8	
Other countries		2	4		6	4	10		10	7.7	60.0
China		2	3		5	2	7		7	5.4	71.4
All countries	*3*	*15*	*58*	*23*	*99*	*31*	*130*		*130*	*100.0*	*76.2*

Table A-1 - *continued*

	Restrictive outcomes*(a)*					Non-restrictive outcomes	Total *(b)*	Unknown outcomes	Total *(c)*	Shares in initiations	Restrictiveness ratio *(d)*
	VERs	Duties	Under	Mixed	Total						
						1983–86					
Developed	1	10	6	4	21	4	25		25	16.7	84.0
Japan		5	1	3	9	2	11		11	7.3	81.8
United States[a]		1		1	2	1	3		3	2.0	66.7
Eastern Europe	1	1	35	4	41	14	55		55	36.7	74.5
Czechoslovakia			7		7	3	10		10	6.7	70.0
East Germany			8		8	2	10		10	6.7	80.0
Hungary			5	1	6	1	7		7	4.7	85.7
Poland			4		4	2	6		6	4.0	66.7
Romania	1		4	1	6	3	9		9	6.0	66.7
NICs	2	6	17	4	29	27	56		56	37.3	51.8
Spain	1	1	4		6	7	13		13	8.7	46.2
Turkey			1	2	3	1	4		4	2.7	75.0
Yugoslavia		1	6		7	8	15		15	10.0	46.7
Mexico		1	1		2		2		2	1.3	100.0
Hong Kong											
South Korea			1		1	1	2		2	1.3	100.0
Other countries		2	6	2	10	4	14		14	9.3	71.4
China			4	2	6	1	7		7	4.7	85.7
All countries	*4*	*19*	*64*	*14*	*101*	*49*	*150*		*150*	*100.0*	*67.3*

Table A-1 - *continued*

	Restrictive outcomes*(a)*					Non-restric-tive outcomes	Total *(b)*	Unknown outcomes	Total *(c)*	Shares in initia-tions	Restric-tiveness ratio *(d)*
	VERs	Duties	Under	Mixed	Total						
						1987–89[f]					*(g)*
Developed		2		4	6	6	12	16	28	28.9	60.0
Japan		2		3	5	4	9	11	20	20.6	71.4
United States[e]				1	9				1	1.0	100.0
Eastern Europe		2			2		2	11	13	13.4	100.0
Czechoslovakia								1	1	1.0	
East Germany								1	1	1.0	
Hungary								2	2	2.1	
Poland								2	2	2.1	
Romania		1			1			3	4	4.1	100.0
NICs		12		3	15	2	17	25	42	43.3	88.2
Spain[h]											
Turkey		3			3		3		3	3.1	100.0
Yugoslavia		3			3		3	5	8	8.2	100.0
Mexico		3			3		3		3	3.1	100.0
Hong Kong								7	7	7.2	
South Korea		1		2	3		3	9	12	12.4	100.0
Other countries		1			1		1	13	14	14.4	100.0
China								11	11	11.3	
All countries		*17*		*7*	*24*	*8*	*32*	*65*	*97*	*100.0*	*80.0*

Table A-1 *(Notes)*

[a] VERs: voluntary export restraints; Duties: antidumping duties; Under: undertakings; Mixed: mixed outcomes.

[b] Sum of restrictive and nobrestrictive outcomes.

[c] Sum of sum (b) and unknown outcomes.

[d] Ratio of restrictive outcomes to all outcomes [sum (c)].

[e] Including Puerto Rico and the U.S. Virgin Islands.

[f] Provisional figures for outcomes (most of the 1988–89 cases are not yet terminated).

[g] Based on the 1987 cases only.

[h] No antidumping cases have been lodged against Spain since its accession to the EC in 1986.

Sources: *European Community Official Journal*; author's own computations.

Table A-2

European Community Antidumping Cases for Selected Industries, 1980–89

	Restrictive outcomes(a)					Non-restrictive outcomes	Total (b)	Unknown outcomes	Total (c)	Shares in initiations	Restrictiveness ratio (d)
	VERs	Duties	Under	Mixed	Total						
						1980–82					
Industrial chemicals		10	18	8	36	7	43		43	33.1	83.7
Machinery			7		7	5	12		12	9.2	58.3
Sawmills			2	2	4	4	8		8	6.2	50.0
Synthetic products			10		10	1	11		11	8.5	90.9
Iron & steel	2	3	9	3	17		17		17	13.1	100.0
Nonferrous metal products						4	4		4	3.1	
Glass, glass products											
Metal products				1	1		1		1	0.8	100.0
Cement, plaster											
Fertilizers				1	1		1		1	0.8	100.0
Electrical appliances			3		3		3		3	2.3	100.0
Radios, TVs	1				1	1	2		21	1.5	50.0
Office machinery											
Spinning, weaving		2	1	2	5		5		5	3.8	100.0
All industries	*3*	*15*	*58*	*23*	*99*	*31*	*130*		*130*	*100.0*	*76.2*

Table A-2 - *continued*

	Restrictive outcomes*(a)*					Non-restrictive outcomes	Total *(b)*	Unknown outcomes	Total *(c)*	Shares in initiations	Restrictiveness ratio *(d)*
	VERs	Duties	Under	Mixed	Total						
						1983–86					
Industrial chemicals		4	20	5	28	7	36		36	24.0	80.6
Machinery		3	2		5	2	7		7	4.7	71.4
Sawmills			3		3	9	12		12	8.0	25.0
Synthetic products		1	1	3	5	4	9		9	6.0	55.6
Iron & steel	3	2	5	1	11	4	15		15	10.0	73.3
Nonferrous metal products				1	1	7	8		8	5.3	12.5
Glass, glass products		1	12		13		13		13	8.7	100.0
Metal products			1		1	5	6		6	4.0	16.7
Cement, plaster						4	4		4	2.7	
Fertilizers		4	10		14		14		14	9.3	100.0
Electrical appliances			3		3		3		3	2.0	100.0
Radios, TVs											
Office machinery		2			2	1	3		3	2.0	66.7
Spinning, weaving				1	1		1		1	0.7	100.0
All industries	*4*	*19*	*64*	*14*	*101*	*49*	*150*		*150*	*100.0*	*67.3*

Table A-2 - *continued*

	Restrictive outcomes(*a*)					Non-restrictive outcomes	Total (*b*)	Unknown outcomes	Total (*c*)	Shares in initiations	Restrictiveness ratio (*d*)
	VERs	Duties	Under	Mixed	Total						
						1987–89[e]					(*f*)
Industrial chemicals		1		2	3		3	20	23	24.0	100.0
Machinery						1	1	1	2	2.1	
Sawmills											
Synthetic products		9		1	10		10	1	11	11.5	100.0
Iron & steel		5			5		5	8	13	13.5	100.0
Nonferrous metal products								2	2	2.1	
Glass, glass products											
Metal products								1	1	1.0	
Cement, plaster											
Fertilizers								4	4	4.2	
Electrical appliances											
Radios, TVs				2	2	3	5	11	16	16.7	40.0
Office machinery		2		2	4		4	1	5	5.2	100.0
Spinning, weaving								5	5	5.2	
All industries		*17*		*7*	*24*	*8*	*32*	*65*	*97*	*100.0*	*80.0*

Table A-2 *(Notes)*

[a] VERs: voluntary export restraints; Duties: antidumping duties; Under: undertakings; Mixed: mixed outcomes.

[b] Sum of restrictive and nobrestrictive outcomes.

[c] Sum of sum (b) and unknown outcomes.

[d] Ratio of restrictive outcomes to all outcomes [sum (c)].

[e] Provisional figures for outcomes (most of the 1988–89 cases are not yet terminated).

[f] Based on the 1987 cases only.

Sources: *European Community Official Journal*; author's own computations.

A Comment

Richard Diamond

Patrick Messerlin's paper reflects the general consensus that dumping is, to quote Michael Trebilcock, "one of the most transparent but long-lived intellectual hoaxes in international trade law."[1] Certainly, no justifiable economic rationale exists for comprehensive laws against dumping. Even then, we are talking about dumping laws in the abstract — that is, laws based on an entitlement to be free from the effects of international price discrimination. Needless to say, that is not the dumping regime which exists in the European Community (EC), the United States, or elsewhere. The irrationalities that exist in the process of determining dumping margins are mind boggling, exceeded only by the irrationality of countervailing duty calculations.

However, Messerlin goes further than a simple critique of antidumping laws, contending that we should be fearful of such laws for three specific reasons. First, he contends that EC dumping law has been "privatized." By this, he means that private firms have gained *de facto* control of dumping decisions and are using them to facilitate cartel behavior or to raise rivals' costs. Second, Messerlin argues that the private companies which control antidumping law have radically expanded its use. Third, he contends that the new privatized antidumping rules are in direct conflict with the principles of the GATT.

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[1] Michael J. Trebilcock, "Is the Game Worth the Candle?" *Law and Policy in International Business* 21 (forthcoming, 1990).

There is no question that antidumping laws do not maximize welfare and need to be reformed. However, I am less sure of the economic Armageddon that Messerlin describes. Some of my difficulties relate to the evidence he has placed before us; others relate to the substance of his arguments. In general, they may be clarified by asking three questions. First, do Messerlin's numbers show a radical expansion of antidumping proceedings? Second, are GATT principles being defiled? And third, are the antidumping laws somehow becoming more privatized?

Messerlin refers to the "irresistible rise" of antidumping regulation in the EC. While there seems to be agreement that the use of such proceedings has grown,[2] Messerlin's statistics do not allow us to determine the extent of the increase. The main problem lies in using the number of cases filed as an index of the level of antidumping activity. The number of petitions filed by a company or industry that decides to proceed under antidumping statutes depends on many factors. Even if two industries are of equal size and produce goods of equal value, one may file many more cases than the other if its product mix is more diverse. The number of cases initiated will also vary depending on political factors, such as the anticipated public reaction to news of the filing of multiple petitions for relief. Of greater importance, the number of cases filed may have strategic value. The ability of some governmental organizations to administer antidumping proceedings is constrained by staff limitations and statutory time limits.[3] The filing of multiple petitions may overwhelm the agency, forcing it to chose between cursory adjudication or a settlement acceptable to the complainant. If these factors can affect the number of cases filed by any one petitioner,[4] what can we infer from an increase in the total number of cases?

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[2] See Jean-François Bellis, "The EEC Antidumping System," in John H. Jackson and Edwin Vermulst, eds., *Antidumping Law and Practice* (Ann Arbor: University of Michigan Press, 1989).

[3] Ibid., pp. 48–49.

A similar problem exists in citing the number of EC industries involved in antidumping proceedings. Here, the raw numbers provided are certainly not overwhelming. According to Messerlin's statistics, from 1983 to 1986, six industries discovered dumping. From 1987 to 1989, three industries discovered dumping. Thus, the growth was approximately one industry per year. Given the fact that dumping calculations are biased to come up with positive margins, it seems prudent to ask why we do not see more industries filing petitions for relief.

Of course, it is possible that the dangerous growth in the use of antidumping laws to which Messerlin refers has occurred. However, without data on the size of the industries involved, the statistics are not convincing.

The second question Messerlin raises is whether he is correct in his judgment that GATT principles are being "sapped" by the privatized dumping regime. Surely no one will quarrel that dumping duties are inconsistent with two principal tenets of the GATT. Dumping duties raise tariff levels, while the GATT has lowered bindings. Moreover, dumping duties are discriminatory in their application, and do not conform to most-favored-nation treatment under Article I.[5] However, just as surely, basic antidumping principles cannot be seen as "renting the fabric of the GATT." To make an obvious point, as illogical as antidumping proceedings may be, they are specifically allowed by GATT Article VI,[6] and are therefore a sanctioned exception to the principles contained in other articles.

Perhaps what Messerlin means is that the *new* dumping rules somehow sap the GATT. In this regard, he argues that the specificity of antidumping remedies is inconsistent with a proper determination of injury in dumping proceedings. He states:

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[4] Messerlin notes that the large upsurge in EC cases in 1978 (83) occurred because 49 steel cases were filed.

[5] General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A3, T.I.A.S. No. 1700, 55 U.N.T.S. 187 (entered into force Jan. 1, 1948) Article I.

[6] Ibid., Article VI.

> The causal relationship implied by the injury concept requires an antidumping action to establish the impact in terms of the injury to each "dumper" and to impose antidumping measures only on the "dumped" imports having the injurious effect.

If this analysis is correct, the rules regarding cumulation in injury proceedings must also be revised.

In this case, I disagree with the premise of Messerlin's argument. The best way to understand both current countervailing duty and dumping statutes is to characterize them, as have Warren Schwartz and others,[7] as an entitlement given to domestic producers to be free from the effects of certain foreign imports. It follows that the focus of the relevant GATT provisions is on the harm done to producers in the importing country, and not on the moral culpability of the exporting company or country. Indeed, it is this theory which explains why the injury test exists in the first place. It follows that in judging whether duties must be assessed, the relevant question is whether the entitlement was compromised by the effect of dumping — regardless of whether the dumped goods came from one country or many countries, or whether the dumped goods from any particular country alone would have caused injury.

Finally, Messerlin argues that antidumping proceedings in the EC are becoming "privatized." There can be no question that industries in both the United States and the EC use antidumping proceedings to further their attempts to obtain market power and extract monopoly rents.[8] The question is whether the use of antidumping laws to achieve cartelization has recently increased. Again, the facts provided do not make the case. If dumping is evermore becoming a tool of cartelization, we should expect to see in the industries that have filed recent antidumping cases the characteristics necessary for cartel formation. The literature suggests that two such characteristics, among others, are barriers to entry and product homogeneity.[9] These characteristics certainly existed for the major industries filing in the 1980–86 period — steel and chemicals. However, for the 1987–89 period, the industries that filed were, according to Messerlin, radios and television, office machinery, and spinning and weaving. The products of these industries are certainly not homogeneous, nor is it clear that barriers to entry are high. As in the case of the statistics on increases in the use of antidumping laws, we need more information to support the proposed thesis.

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[7] See Charles J. Goetz, Lloyd Granet, and Warren F. Schwartz, "The Meaning of 'Subsidy' and 'Injury' in the Countervailing Duty Law," *International Review of Law and Economics* 6 (1986); and Richard Diamond, "Economic Foundations of Countervailing Duty Law," *Virginia Journal of International Law* 29 (1989).

Messerlin points to EC anticircumvention rules as another example of privatization. Again, there is no question that such rules restrict trade. However, the relevant inquiry is whether the rules show an aberrational increase in control by private parties or a logical outcome of restrictive public policies. In this regard, one element of the relationship between dumping and cartelization is of great interest. Dumping duties can act to exclude a foreign producer that will not join an EC cartel. By raising the effective cost of the good, the duty can prevent the foreign firm from neutralizing the cartel's decision to restrict output. However, one characteristic of dumping duties limits this procartel effect. The foreign producer can escape the duty if it situates its factory in the EC. If the effect of the antidumping law is to cause foreign producers to place new factories in the

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[8] Diane P. Wood, "'Unfair' Trade Injury: A Competition-Based Approach," *Stanford Law Review* 41 (1989).

[9] Phillip Areeda and Donald F. Turner, *Antitrust Law*, vol. 2 (Boston: Little, Brown, 1978), pp. 268–282, 298–299.

EC, the law has become a factor in defeating the cartel, since it has prompted the independent producer to locate its facility in the heart of the cartel's territory.

Viewed against this background, it is not clear that the anticircumvention rules show a wholesale takeover of antidumping procedures by private parties. The anticircumvention regulations certainly raise rivals' costs by restricting the freedom of foreign producers to place plants where they are most efficient. However, they still place great pressure on foreign firms to locate facilities within the EC,[10] an outcome which EC cartels would certainly oppose.

What makes this example important in terms of assessing Messerlin's thesis is that alternative reasons exist for the structure of the anticircumvention rules. Such regulations are believed to increase local procurement and employment within the EC.[11] In other words, while the rule may help private parties, it also furthers public policy. It is this facet of the rule that leads me to question the depth of the privatization that Messerlin describes.

The word "privatize" evokes images of British Steel, of productive enterprises that have shucked government supervision in favor of private control, guided only by market principles. Yet, while antidumping laws and the recent changes in those laws may help private parties, while some historically powerful industries, such as steel, have undoubtedly learned to play the dumping game well, the facts cited here do not show nearly as great a shift in control. Indeed, Messerlin suggests no mechanism by which total cooptation has occurred. Nor can we infer privatization from the fact that the policies contained in the cumulation and anticircumvention rules favor private parties. What we may be seeing is not cooptation, but the coincidence of private benefit and public policy.

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[10] Bellis, "The EEC Antidumping System," pp. 58–59.

[11] Gerwin Van Gerven, "New Anti-Circumvention Rules in EEC Anti-Dumping Law," *International Lawyer* 22 (1988).

If this is the case, it is a mistake to focus our attention so totally on private industry and its use of antidumping laws. Instead, we must keep sight of the reasons why governments perpetuate antidumping laws, despite their irrationality. Of course, irrational policies, like rational policies, are bargaining chips to be laid down at the Uruguay bargaining table. It remains to be seen whether some of the irrationalities in the antidumping area will be traded for rules in other areas that enhance free trade. However, if they are not, I believe we would do better to concentrate on the bankruptcy of the policy underlying antidumping laws, and not on the policy's manipulation by private parties if we are ever to see their demise.

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Country-Factor Bias in the Administration of Antidumping and Countervailing Duty Cases

Andrew Anderson and Alan M. Rugman

Introduction

In 1979, after the negotiations on the Tokyo Round of the General Agreement on Tariffs and Trade (GATT) were completed, new Antidumping and Subsidies-Countervailing Duty Codes were put in place that permitted signatories to those codes to place legal duties on unfairly dumped or subsidized goods. As of September 4, 1987, 23 nations have signed the Antidumping Code and 22 have adopted the Subsidies-Countervailing Duty Code. A further 30 nations have observer status under the Antidumping Code, while 28 have observer status under the Subsidies-Countervailing Duty Code.[1]

In this paper, we examine at an aggregate level the possible linkages that may exist between the use of the Antidumping and Subsidy-Countervailing Duty (CVD) Codes, and the balance of trade — exports minus imports — between nations that use these codes and their trading partners. We wish to test the hypothesis that a country factor may or may not bias the use of antidumping and CVD laws.[2] This paper focuses on country-level data, and does not conduct any industry- or firm-level analysis of the use of antidumping and CVD trade laws. Other writers have used empirical data to examine the use of antidumping and CVD cases.[3]

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[1] See Sidney Golt, *The GATT Negotiations 1986–90: Origins, Issues and Prospects* (London: British-North American Committee, 1988), pp. 73–75.

[2] This is an extension of the ideas found in Alan M. Rugman and Andrew D.M. Anderson, *Administered Protection in America* (London; New York: Routledge/Croom Helm, 1987).

In order to assess any relationships that exist between the balance of trade and the corresponding use of unfair trade laws, this paper develops a pragmatic policy approach employing a two-dimensional matrix to provide a visual framework. This permits a more policy-oriented understanding than one that can come from an econometric model — which could be attempted as a complement to, but not as a substitute for, this work. The framework presented is simple and straightforward, so that most readers should be able to draw their own inferences as to the relationship between the factors being studied.

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[3] For analysis of the United States' use of unfair trade laws, see J. Michael Finger and Tracy Murray, "Policing Unfair Imports: The United States Example" (World Bank, Washington, D.C., April 1989, Mimeographed); J. Michael Finger and Julio Nogues, "International Control of Subsidies and Countervailing Duties," *World Bank Economic Review* 1 (1987): 707–725; and Chong-Hyun Nam, "Export-Promoting Subsidies, Countervailing Threats, and the General Agreement on Tariffs and Trade," *World Bank Economic Review* 1 (1987): 727–743. The latter two papers are primarily on CVD actions. For the European Community's use of antidumping cases, see Patrick A. Messerlin, "The EC Antidumping Regulations: A First Economic Appraisal, 1980-1985," *Weltwirtschaftliches Archiv* 125 (1989); and idem, "GATT-Inconsistent Outcomes of GATT-Consistent Laws: The Long-Term Evolution of the EC Antidumping Law," World Bank Working Papers, draft (World Bank, Washington, D.C., January 1989). For antidumping use by Mexico, see Patrick A. Messerlin, "The Mexican Antidumping System: Two Years After," World Bank Working Papers, draft (World Bank, Washington, D.C., December 1988); and for Latin American use of export subsidies and CVDs, see Julio Nogues, *Latin America's Experience with Export Subsidies*, World Bank International Economics Department, Policy, Planning and Research Working Papers 182 (Washington, D.C. World Bank, 1989). Another useful paper, on the use of price undertakings by the EC, is Klaus Stegemann, "EC Anti-dumping Policy; Is Settlement by Price Undertaking a Legal Substitute for Illegal Price Fixing?" *Weltwirtschaftliches Archiv* 126 (1990). A comparison of the EC's use of undertakings with that of Canada is found in Klaus Stegemann, "Settlement of Anti-Dumping Cases by Price Undertaking: Is the E.C. More Liberal than Canada?" (Queen's University, Department of Economics Working Paper, revised version, Kingston, Ont., April 1990).

Since the mid- to late 1970s, the United States has experienced a trade deficit, particularly with Japan and West Germany. Various members of the European Community (EC) have also faced trade deficits with Japan. Canada is one of the few Western countries that has maintained a trade surplus, mainly because of its exports in primary products. The results of these trade deficits with Japan and West Germany have, in some quarters, led to calls for managed trade, or for the development and refinement of strategic trade policy. This has been particularly true for elements in the United States.[4]

For example, one study has found that while Japan publicly announced the opening up of its markets, in reality it maintained market closure, effectively causing the United States' trade deficit with that country to soar from US$7.6 billion in 1977 to US$60 billion in 1986.[5] Similarly, another study shows that four of the five types of economic systems presently in use are not founded on the free trade economic model. These are economies that are centrally planned, like the Soviet Union; mixed, like France; developing, like Mexico; and plan driven, like Japan.[6]

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[4] For a discussion of this issue, see Alan M. Rugman and Alain Verbeke, *Strategic Trade Policy Is Not Good Strategy*, Research Programme Working Paper 26 (Toronto: Ontario Centre for International Business, 1990).

[5] Robert T. Green and Trina L. Larsen, "Only Retaliation Will Open Up Japan," Special Report, *Harvard Business Review* (Nov.-Dec. 1987): 22–29. The latest trade statistics show that this surplus has fallen to US$49 billion for 1989 (see "Japanese Trade Surplus in February Declines 30 Percent from Year Ago," *Globe and Mail* [Toronto], March 15, 1990).

[6] Pat Choate and Juyne Linger, "Tailored Trade: Dealing," *Harvard Business Review* (Jan.-Feb. 1988): 86–93. Only the Anglo-American system is rooted in free and fair trade according to their thesis. The solution that Choate and Linger offer to this multitude of economic systems is to have the United States develop a variety of tailored trade approaches to match those of specific trading partners. In effect, a series of bilateral negotiations would ensue and the GATT would recede into a second-tier role, handling such "minor" problems as the definition of what constitutes a government (countervailable) subsidy.

An examination of the data underlying these premises is, therefore, quite important from a trade policy perspective. This can be seen by the set of negotiations that the United States has just completed with Japan, in which the United States attempted to persuade Japan to "open up" its "closed" internal markets to U.S. exports, thereby helping to eliminate Japan's large trade surplus with the United States. These types of negotiations are not new. The United States has been negotiating with Japan ever since Admiral Perry threatened to blockade that country with his four warships — "black ships" — in the 1850s if Japan did not open up its markets.[7] The pursuit of such bilateral actions by the United States is increasing the inherent danger of restricting freer world trade and undermining the multilateral principles of the GATT.[8]

The Influence of the Balance of Trade on Trade Law Cases: Two Hypotheses

This paper tests two hypotheses on the relationship between the balance of trade and the number of cases — including positive cases — initiated against a defender country. The first hypothesis is that the balance of trade is one of the factors that determines whether or not a country is likely to be targeted for an antidumping or CVD trade law action. If the defender country contributes to a positive balance of trade with the initiating country, then it will face few actions. Moreover, in most of these cases, the finding will be negative — that is, that the country was not subsidizing, the firm was not dumping, or the subsidy or dumping was not causing "material injury" to the initiating country. The rationale for this hypothesis is the assumption that countries tend to use antidumping and CVD trade laws not to create a "level playing field," but to shelter their inefficient domestic firms against more efficient foreign competitors in countries that contribute toward a deficit on the balance of trade.[9]

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[7] See Clyde W. Prestowitz, *Trading Places: How We Allowed Japan to Take the Lead* (New York: Basic Books, 1988); and "Japanese PM Tries to Drum Up Public Support for Reform Plan," *Globe and Mail* (Toronto), April 7, 1990.

[8] These issues have been examined by Sylvia Ostry, *Governments and Corporations in a Shrinking World: Trade and Innovation Policies in the United States, Europe, and Japan* (New York; London: Council on Foreign Relations Press, 1990).

The second hypothesis is that more cases, and a relatively larger number of positive findings, will occur against those countries that show a large trade surplus with the initiating country. This will be tested by the methodological framework developed in a later section. In this context, the occurrence of a large bilateral trade deficit could be used strategically — by both firms and public agencies in a politicized process — as a credible proxy for a foreign nation's alleged unfair trade law practices, thus providing a rationale for granting shelter.

The Present Use of Antidumping and CVD Trade Laws

The GATT Secretariat monitors the use of unfair trade laws by those nations that have adopted the Antidumping and CVD Codes. While the various countries that use unfair trade laws are supposed to supply the data on their use of antidumping and CVD to the GATT, discrepancies exist between how the various national agencies measure the use of such actions and how the GATT measures use. This problem is eliminated by using only one data source. The GATT defines a case as each action initiated against a country's product or agglomeration of products. If five countries' products are targeted within a country's trade law action, then this constitutes five separate cases.[10]

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[9] This follows from the shelter-seeking argument at the firm level, as described in Rugman and Verbeke, *Strategic Trade Policy Is Not Good Strategy*; and idem, *Global Corporate Strategy and Trade Policy* (London; New York: Routledge, 1990). Rugman and Anderson (*Administered Protection in America*) examine the political bias in the administration of U.S. antidumping and CVD trade law, but this work is not extended to other countries.

Antidumping Trade Law: Initiators

Since the end of the GATT Tokyo Round, 11 countries have utilized the antidumping statutes adopted under the GATT framework, resulting in 1,174 cases being launched over the 1980 to 1988 period (see Table 1). Of these cases, the newly industrialized countries (NICs) of South Korea, Mexico, and Brazil accounted for only seven; the other NICs — Taiwan, Hong Kong, and Singapore — had no actions. The vast majority of cases — 1,145, or 97.5 percent — were taken by four countries: the United States, Australia, Canada, and the EC.[11]

Out of the 1,174 worldwide antidumping cases launched, more than half of them — 671 cases, or 57.2 percent — resulted in the imposition of a trade restraint. Of the four large initiators of antidumping actions, the EC had the highest success rate with 158 cases — 71.5 percent of the 221 cases initiated — resulting in a positive finding of dumping or negotiation of a price undertaking. The United States had a greater number of positive cases — 209 out of 347 — but a lower success rate of 60.2 percent. It has rarely used undertakings. Of the 259 Canadian antidumping cases, 150 — 57.9 percent — resulted in a positive finding or undertaking. Australia had the lowest success rate, with 141 successful cases out of 318 — 44.3 percent — resulting in a positive finding of dumping or an undertaking.

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[10] The GATT data used here are the latest available, and cover the period from January 1, 1980, to June 30, 1988. See General Agreement on Tariffs and Trade, *Basic Instruments and Selected Documents*, Thirty-Sixth Session through Forty-Fourth Session (Geneva: GATT, March 1981–June 1989): Appendix Tables; Summary of Anti-Dumping Actions and Countervailing Duty Actions, various pages. All of the statistical results recorded in this paper are based on this GATT data source, because it is standardized across nations.

[11] The EC is regarded as a single country, since individual nations within the Community are not permitted to launch a CVD or antidumping case; instead, these are launched by the EC on behalf of its members.

The United States was responsible for 31.2 percent of all positive antidumping actions concluded worldwide during the 1980–88 period, followed by the EC (23.6 percent), Canada (22.4 percent), and Australia (21.0 percent). The rest of the world accounted for less than 2 percent of successful antidumping cases.

Antidumping Trade Law: Defenders

Most GATT antidumping cases are initiated against industrial countries or against countries that are reliant on the industrial countries' markets for their products. Of the 58 percent of cases brought against the Western industrial countries, nearly 32 percent of the defenders were European, including members of the EC. Of the remainder, approximately 11 percent of the cases were against Japan, 9 percent against the United States, and just over 3 percent against Canada. Two percent were initiated against Australia and New Zealand. The socialist countries accounted for a little over 15 percent of the world's defenders, bringing the total number of actions initiated against the industrial countries to 73 percent.

Of the remaining 27 percent of cases, nearly 18 percent were brought against the NICs, while another 9 percent were against the developing countries of South and Central America, Asia, and Africa.

CVD Trade Law: Initiators

While the use of the GATT's antidumping law is fairly diversified amongst the industrial nations, CVD law has been used largely by the United States, which accounted for approximately 58.5 percent of all the GATT CVD actions launched worldwide (see

Table 1

Worldwide Antidumping Actions against Various Countries and Regions, July 1980–June 1988

	Initiators												
Defenders	**U.S.**	**Austral.**	**Canada**	**EC**	**Finland**	**S. Korea**	**N.Z.**	**Sweden**	**Mexico**	**Austria**	**Brazil**	**Total**	**% of world**
Industrial													
EC	108	97	95	18	1	0	0	0	0	1	0	320	27.26
Other Europe	12	9	13	16	3	0	0	0	0	0	0	53	4.51
Japan	44	31	20	31	0	0	0	0	0	0	0	126	10.73
U.S.	0	37	44	23	0	0	0	0	1	0	0	105	8.94
Other industrial	7	6	3	0	0	0	1	0	0	0	0	17	1.45
Canada	21	6	0	7	0	3	0	0	0	0	0	37	3.15
South Pacific	4	16	0	1	0	0	0	0	0	0	0	21	1.79
Subtotal	*196*	*202*	*175*	*96*	*4*	*3*	*1*	*0*	*1*	*1*	*0*	*679*	*57.84*
Socialist	26	18	20	100	9	0	0	3	1	0	1	178	15.16
Total industrial	*222*	*220*	*195*	*196*	*13*	*3*	*1*	*3*	*2*	*1*	*1*	*857*	*73.00*
% of total	63.98	69.18	75.29	88.69	100.00	75.00	25.00	75.00	100.00	100.00	100.00	73.00	
NICs	74	63	45	25	0	1	0	1	0	0	0	209	17.80
% of total	21.33	19.81	17.37	11.31	0.00	25.00	0.00	25.00	0.00	0.00	0.00	17.80	

Table 1 - *continued*

	Initiators												
Defenders	**U.S.**	**Austral.**	**Canada**	**EC**	**Finland**	**S. Korea**	**N.Z.**	**Sweden**	**Mexico**	**Austria**	**Brazil**	**Total**	**% of world**
Developing													
South & Central America	24	2	4	0	0	0	1	0	0	0	0	31	2.64
Asia	23	27	13	0	0	0	2	0	0	0	0	65	5.54
Africa	3	4	2	0	0	0	0	0	0	0	0	9	0.77
Gulf states	1	2	0	0	0	0	0	0	0	0	0	3	0.26
Subtotal	*51*	*35*	*19*	*0*	*0*	*0*	*3*	*0*	*0*	*0*	*0*	*108*	*9.20*
% of total	14.70	11.01	7.34	0.00	0.00	0.00	75.00	0.00	0.00	0.00	0.00	9.20	
Totals	*347*	*318*	*259*	*221*	*13*	*4*	*4*	*4*	*2*	*1*	*1*	*1,174*	*100.00*
% of total	29.56	27.09	22.06	18.82	1.11	0.34	0.34	0.34	0.17	0.09	0.09	100.00	
Positive cases^a	209	141	150	158	6	2	1	2	2	0	0	671	57.16
% positive	60.23	44.34	57.92	71.49	46.15	50.00	25.00	50.00	100.00	0.00	0.00	57.16	
% of world (+) actions	31.15	21.01	22.35	23.55	0.89	0.30	0.15	0.30	0.30	0.00	0.00	100.00	

[a] Includes undertakings.

Source: General Agreement on Tariffs and Trade, *Basic Instruments and Selected Documents*, Supplements 27–36 (Geneva, 1980–89).

Table 2). This increases to just over 84 percent if Chile is excluded from the calculation.[12]

The United States accounted for 92 percent of the world's CVD definitive duty cases, and 86 percent of all positive cases if price undertakings are included. Other users of the GATT's CVD unfair trade law include: Australia, 23 cases; Canada, 15 cases; the EC, 5 cases; New Zealand, 5 cases; and Japan, 1 case. The total of 49 cases account for approximately 11 percent of the world's 452 CVD actions initiated (15.7 percent of all actions, if Chile's cases are excluded).

CVD Trade Law: Defenders

The industrialized countries have been the target of most GATT CVD cases. The EC faced the most actions: 111 cases, or 24.6 percent of the world's cases. The United States faced only a limited number of CVD actions: one brought by Canada against grain corn imports in 1986–87, and another brought by Australia in 1982–83.[13]

There were 136 cases brought against the less-developed countries (LDCs), or nearly 30 percent of all the world's GATT reported cases. If Chile is excluded, of the 313 cases remaining, 83 actions — or just over 26 percent of the cases — were brought against the LDCs. If, however, the United States is excluded, out of the 49 CVD cases brought by the remaining five countries, only three were launched against the LDCs. Of these three cases, not one was successful against an LDC.[14]

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[12] Most of Chile's CVD actions were launched before March 1983, principally against Argentina, Brazil, Peru, and Spain. Only one of Chile's cases reached an affirmative decision — it does not appear in GATT data — while the other cases were abandoned due to threats of retaliation by the trading partners against whom the cases were brought. See Finger and Nogues, "International Control of Subsidies and Countervailing Duties," p. 713.

[13] The second case does not show up in the official case printout list, only in the annual GATT list.

[14] This finding is at odds with the Finger and Nogues, who conclude that "CVDs actions are brought against a different group of countries than the..

As far as the United States is concerned, 80 of its CVD cases — nearly 30 percent — were initiated against products from the LDCs, resulting in the imposition of definitive duties against products from Kenya, Argentina, Columbia, Chile, China, India, Thailand, and Venezuela.

Modeling the Net Balance of Trade and the Number of Trade Law Actions

In order to examine the relationship between the aggregate balance of trade and the incidence of positive GATT unfair trade law findings, we use a two-dimensional matrix approach, as detailed in Figure 1.[15]

The horizontal axis on the matrix indicates an average positive or negative trade balance for the country that initiated the unfair trade law action. A positive trade balance is on the left-hand side, while a negative trade balance is on the right-hand side of the matrix. The average balance of trade is the sum of the bilateral trade balances divided by nine years, or by the number of years that are actually available.[16]

The vertical axis shows the average number of cases launched per country. The top half of the matrix shows the

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14 - cont'd.

...countries which initiate them" ("International Control of Subsidies and Countervailing Duties," p. 713). This discrepancy resulted from the World Bank's inclusion of Taiwan, South Korea, Mexico, and Brazil as LDCs, rather than as NICs, when in reality these countries are "industrialized" in the type of exports that they now produce. This is a vital distinction, since 32 percent of all CVD actions were against the six NICs — Taiwan, South Korea, Brazil, Hong Kong, Singapore, and Mexico.

[15] For a similar type of analysis — an "Index of Discrimination Between Countries" — used in a study of EC trade law cases, see Messerlin, "The EC Antidumping Regulations," Table 6, p. 29. Our analysis, however, builds on an alternative parameter by utilizing the balance of trade, not just the import shares of the defender countries that Messerlin uses.

[16] The average balance of trade data are drawn from International Monetary Fund, *Direction of Trade Statistics* (Washington, D.C., 1987 and 1989).

Table 2

Worldwide Countervail Actions against Various Countries and Regions, July 1980–June 1988

Defenders	**Initiators**								
	U.S.	**Chile**	**Australia**	**Canada**	**EC**	**N.Z.**	**Japan**	**Total**	**% of world**
Industrial									
EC	76	17	7	7	2	2	0	111	24.56
Other Europe	4	0	3	4	0	1	0	12	2.65
Japan	0	1	0	0	0	0	0	1	0.22
U.S.	0	0	1	1	0	0	0	2	0.44
Other industrial	10	1	0	0	0	0	0	11	2.43
Canada	11	0	0	0	0	1	0	12	2.65
South Pacific	9	0	9	0	0	1	0	19	4.20
Subtotal	*110*	*19*	*20*	*12*	*2*	*5*	*0*	*168*	*37.17*
Socialist	4	1	0	0	0	0	0	5	1.11
Total industrial	*114*	*20*	*20*	*12*	*2*	*5*	*0*	*173*	*38.27*
Percent of total	43.18	14.39	86.96	80.00	40.00	100.00	0.00	38.27	
NICs	70	66	2	2	3	0	0	143	31.64
Percent of total	26.52	47.48	8.70	13.33	60.00	0.00	0.00	31.64	

Table 2 - *continued*

	Initiators								
Defenders	**U.S.**	**Chile**	**Australia**	**Canada**	**EC**	**N.Z.**	**Japan**	**Total**	**% of world**
Developing									
South & Central America	35	52	1	1	0	0	0	89	19.69
Asia	22	1	0	0	0	0	1	24	5.31
Africa	19	0	0	0	0	0	0	19	4.20
Gulf states	4	0	0	0	0	0	0	4	0.88
Subtotal	*80*	*53*	*1*	*1*	*0*	*0*	*1*	*136*	*30.09*
Percent of total	30.30	38.13	4.35	6.67	0.00	0.00	100.00	30.09	
Totals	*264*	*139*	*23*	*15*	*5*	*5*	*1*	*452*	*100.00*
Percent of total	58.41	30.75	5.09	3.32	1.11	1.11	0.22	100.00	
Positive cases[a]	120	0	11	6	3	0	0	140	30.97
Percent positive	45.45	0.00	47.83	40.00	60.00	0.00	0.00	30.97	
Percent of world (+) actions	85.71	0.00	7.86	4.29	2.14	0.00	0.00	100.00	

[a] Includes undertakings.

Source: General Agreement on Tariffs and Trade, *Basic Instruments and Selected Documents*, Supplements 27–36 (Geneva, 1980–89).

countries with a number of cases less than or equal to the average, while the bottom half shows the countries with a case load above the average. For example, the United States had a total of 347 cases brought against 51 countries. Thus, 347 cases divided by 51 countries gives an average of 6.8 cases per country, rounded to an average of 7 cases. The number is always rounded up to the next highest whole number.

The number in the top right-hand corner of each quadrant is the number of cases for that quadrant. Similarly, the square in each quadrant indicates the average balance of trade for that quadrant. At the bottom of the figure, the number of definitive duties and the number of undertakings are also indicated by quadrant, along with the balance of trade for the quadrant. In each quadrant, countries with definitive duties are italicized, and double-starred if any undertakings were accepted.

From the hypothesis introduced above, it can be advanced that most of the antidumping or CVD cases will occur in quadrant 4, since a negative trade balance is expected to be used as a rationale for creating shelter in a politicized unfair trade law administration process. Previous research has demonstrated that a loss of competitive advantage in particular industries will lead to an increase in the use of unfair trade laws by business firms.[17] This paper attempts to determine

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[17] Robert M. Feinberg and Barry T. Hirsch, "Industry Rent Seeking and the Filing of 'Unfair Trade' Complaints," *International Journal of Industrial Organization* 7 (1989): 325–340. Several studies have also discovered the existence of procedural biases in the administration of U.S. trade laws. See, for example, J. Michael Finger, H. Keith Hall, and Douglas R. Nelson, "The Political Economy of Administered Protection," *American Economic Review* 72 (June 1982): 452–466; Rugman and Anderson, *Administered Protection in America*; Ronald A. Cass, *Economics in the Administration of U.S. International Trade Law*, Research Programme Working Paper 16 (Toronto: Ontario Centre for International Business, July 1989); and Alan M. Rugman and Samuel D. Porteous, "Canadian and U.S. Unfair Trade Laws: A Comparison of Their Legal and Administrative Structures," *Canadian Business Law Journal* 16 (December 1989): 1–16, and *North Carolina Journal of International Law and Commercial Regulation* 15 (March 1990).

Figure 1

Analysis of GATT Antidumping and Countervailing Duty Cases

	BALANCE OF TRADE	
	Positive	**Negative**
AVERAGE NO. OF CASES ≤ Less than or equal to average	1 (# of cases in 1)	3 (# of cases in 3)
> Greater than average	2 (# of cases in 2) Balance of trade in quadrant	4 (# of cases in 4)

TOTAL CASES: ( )

NET BALANCE OF TRADE: †

Definitive duties: (0); Net balance of trade: $0
Q1: (0); $0
Q2: (0); $0
Q3: (0); $0
Q4: (0); $0

Undertakings: (0); Net balance of trade: $0
Q1: (0); $0
Q2: (0); $0
Q3: (0); $0
Q4: (0); $0

† millions of U.S. dollars; n.a : not applicable.
Countries in italics had definitive duties applied.
Countries with ** have agreed to undertakings.

whether there is a country-level bias — regardless of firm- and industry-level influences — on the number of antidumping and CVD actions initiated and on the relative number of positive outcomes.

Four possible "balance of trade to the average number of trade cases" situations are observable. Quadrant 1 represents a positive balance of trade and a number of trade cases lower than or equal to the average. Quadrant 3 shows a negative trade balance and a number of trade cases lower than or equal to the average. Quadrant 2 reflects a positive trade balance and a greater-than-average number of trade cases. Quadrant 4 represents a negative trade balance and a greater-than-average number of trade cases. If the aggregate balance of trade between initiator and defender countries has any relationship to the number of cases initiated, then countries against which cases are initiated are most likely to fall in either quadrant 3 or 4.

Antidumping Trade Law Results

The following eight initiating countries were analyzed using the framework developed above: the United States, Canada, the EC, Australia, Finland, New Zealand, South Korea, and Sweden. The only other two countries that have utilized the GATT antidumping laws, Austria and Brazil, were dropped due to a lack of data. The four large users were tabulated separately, since the volume of data for Finland, New Zealand, South Korea, and Sweden is still too small to produce useful results.

The U.S. Antidumping Matrix

The results for the United States are summarized in Figure 2. The majority — 226, or 65.1 percent — of the 347 cases initiated by the United States fall into quadrant 4. This is consistent with our first hypothesis. However, more countries

Figure 2

The United States' Antidumping Cases, 1980–88

AVERAGE NO. OF CASES	BALANCE OF TRADE	
	Positive	**Negative**
≤ 7	1 (43) *Australia* *Turkey* *Kenya* *Netherlands* *Poland* *Argentina* *Columbia* *Israel* Greece Portugal *Chile* *USSR* *East Germany* Ireland El Salvador $11,292.33	3 (53) *Mexico* *Romania*** *Sweden* *Hungary* *India* *Singapore* *Thailand* *Yugoslavia* *Austria* *Finland* *Hong Kong* *New Zealand* *South Africa* *Trinidad & Tobago* *Czechoslovakia* Switzerland Ecuador Iran Malaysia Norway Peru Philippines Costa Rica –$18,217.78
> 7	2 (25) *Belgium/ Luxembourg* *Spain* $3,287.56	4 (226) *Canada* *Japan*** *West Germany* *Brazil* *South Korea* *Italy* *Taiwan*** *France* *China* *U.K.* *Venezuela* –$86,114.56

TOTAL CASES: (347)

NET BALANCE OF TRADE: –$89,752.44 †

Definitive duties: (204); Net balance of trade: –$87,072.11

Q1: (25); $10,204.67 Q3: (27); –$14,449.78

Q2: (8); $3,287.56 Q4: (144); –$86,114.56

Undertakings: (5); Net balance of trade: –$46,706.43

Q1: (0); $0 Q3: (1); –$380.89

Q2: (0); $0 Q4: (4); –$46,325.44

† millions of U.S. dollars.
Countries in italics had definitive duties applied.
Countries with ** have agreed to undertakings.

are targeted in quadrants 3 and 1: 23 and 15, respectively. All of the countries targeted for a GATT antidumping action had at least one positive finding. Of the 226 cases, 148 — or 65.5 percent — were found positive, and had either definitive duties applied or an undertaking accepted. For quadrant 3, 28 of the 53 cases — or 52.8 percent — were found positive. For quadrant 1, the ratio is slightly higher, with 25 out of 43 cases resulting in a positive duty or an undertaking, a success rate of approximately 58 percent. These results suggest that, as far as the United States is concerned, the relative number of positive outcomes is not influenced by the balance of trade. Hence, this parameter does not appear to be used by the so-called technical track in U.S. trade law administration to grant shelter formally.

Out of the group of countries targeted for a GATT antidumping action, those in quadrant 4 contributed US$86,114.56 million of the average U.S. trade deficit of US$89,752.44 million. In quadrant 3, the deficit is US$18,217.78 million. In quadrant 1, the countries targeted had a positive balance of trade of US$11,292.33 million. The three countries in quadrant 2 had a positive balance of trade of US$3,287.56 million. This result — a high number of cases launched against countries that showed a large trade surplus with the United States — is consistent with the second of the two hypotheses presented above.

It is apparent from the matrix that the vast majority — 80.4 percent — of cases fall onto the right-hand side. These are countries that contributed to a negative trade balance for the United States. While some targeted countries had a positive trade balance with the United States, they had a below-average number of cases, as indicated by quadrant 1. U.S. firms have rarely targeted those countries that have a positive trade balance, as indicated by the limited number of countries found in quadrant 2. However, those cases did result in some positive findings.

The United States has also rarely used price undertakings as a means of alleviating unfair trade action. The reason for the lack of use of "suspension agreements," as they are known in the United States, seems to be that they are exceedingly difficult to monitor and should therefore be avoided.[18] Canada also limits its use of price undertakings for a similar reason.

The Australian Antidumping Matrix

The relationship between the average number of cases and the balance of trade for Australia can be seen in Figure 3. Australia targeted 39 countries for GATT antidumping actions. As in the U.S. case, all the countries in Australia's quadrant 4 at one time or another have had a positive GATT antidumping finding, and all were either industrial or one of the NICs. The average number of Australian cases was greater than that for the United States — nine versus seven. The average trade deficit was, however, much smaller for Australia than for the United States: valued at US$1,745.84 million. Quadrants 1 and 2 constitute a smaller share of the total average balance of trade compared with quadrants 3 and 4: approximately a 7:10 ratio for Australia versus 1:10 for the United States.

More cases fall in quadrant 2 in Australia, and more countries are targeted in that quadrant than in the United States. Australia brought 167 cases — or 52.5 percent of the total — against countries that contributed to its average trade deficit. For the United States, the corresponding figure was 80.4 percent of all cases, for a total of 279 cases. Thus, the Australian matrix confirms neither the first nor the second hypothesis, indicating that the balance of trade does not provide a bias in the administration of the Australian trade law process.

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[18] Rugman and Porteous, "Canadian and U.S. Unfair Trade Laws," p. 15.

Figure 3

Australia's Antidumping Cases, 1980–88

	BALANCE OF TRADE	
AVERAGE NO. OF CASES	**Positive**	**Negative**
≤ 9	1 (60) *Malaysia* *Hong Kong* *Philippines* *Singapore* *South Africa* *Thailand* *Romania* *Spain* *East Germany* *Portugal* *Netherlands* *Hungary* Argentina Czechoslovakia USSR Poland Turkey Yugoslavia $1,506.22	3 (25) *Israel* *Norway* *Austria* *Finland* *Canada*** *Sweden* Mexico Qatar Ireland** –$849.56
> 9	2 (91) *Japan*** *South Korea*** *China*** *New Zeland*** *Belgium/ Luxembourg* $2,612.56	4 (142) *France*** *West Germany*** *United States*** *Brazil*** *Italy* *Taiwan* *U.K.*** –$5,015.06

TOTAL CASES: (318)

NET BALANCE OF TRADE: –$1,745.84 †

Definitive duties: (115); Net balance of trade: –$2,492.95

Q1: (19); $651.11 Q3: (12); –$741.56

Q2: (38); $2,612.56 Q4: (46); –$5,015.06

Undertakings: (26); Net balance of trade: –$2,250.54

Q1: (2); $44.56 Q3: (3); –$232.22

Q2: (12); $2,600.56 Q4: (9); –$4,663.44

† millions of U.S. dollars.
Countries in italics had definitive duties applied.
Countries with ** have agreed to undertakings.

Australia has also used price undertakings — 26 in all — more often than has the United States. Most of these were arranged for countries that fall into quadrant 2, which had a positive average trade balance with Australia but a higher-than-average number of cases. Also, the number of undertakings in quadrant 4 was higher for Australia than for the United States. Australia arranged very few undertakings with those countries that had fewer-than-average cases, and they were only with countries that contributed to Australia's trade deficit in quadrant 3.

The Canadian Antidumping Matrix

The analysis of Canada's GATT reported antidumping cases can be seen in Figure 4. Canada initiated slightly more cases (131) against countries with which it had a positive balance of trade than against those with which it had a deficit (128). Overall, the average trade balance of all the countries targeted was US$8,269.13 million. In quadrant 2, which includes such traditional trading partners as the United States, Japan, and the United Kingdom, the average balance of trade was US$10,224.11 million. One reason why Canada launched an above-average number of cases against these three countries — with a high rate of success — may be the large proportion of Canada's trade for which they account. In 1988, for example, Canada's exports to these countries was worth US$89,852 million — 76.9 percent of Canada's total exports of US$116,841 million. In the same year, imports from these three countries totalled US$81,388 million — or 74.8 percent of Canada's total imports of U.S.$108,742 million.

From a political-economy perspective, one could hypothesize that a large absolute trade volume will lead to the heightened visibility of the trading partner concerned, thus stimulating the utilization of the protection-granting process

Figure 4

Canada's Antidumping Cases, 1980–88

BALANCE OF TRADE

AVERAGE NO. OF CASES	Positive	Negative
≤ 5	1 (24) *Argentina* *East Germany*** *India* *Netherlands* *Poland* *USSR* Turkey Yugoslavia** Dominican Republic Norway Portugal $2,236.08	3 (34) *Austria* *Czechoslovakia* *Hong Kong* *Malaysia* *Singapore* South Africa Switzerland Chile Finland Ireland Romania -$1,311.22
> 5	2 (107) *United States*** *Japan*** *China* *U.K.* *Belgium/Luxembourg*** Brazil** $10,224.11	4 (94) *West Germany*** *France* *Italy* *Spain* *Taiwan* *South Korea* *Sweden* -$2,879.84

TOTAL CASES: (259)

NET BALANCE OF TRADE: $8,269.13 †

Definitive duties: (140); Net balance of trade: $8,317.05

Q1: (14); $1,986.00	Q3: (11); -$1,013.22
Q2: (67); $10,224.11	Q4: (48); -$2,879.84

Undertakings: (10); Net balance of trade: $8,766.22

Q1: (2); $50.11	Q3: (0); $0
Q2: (7); $9,480.00	Q4: (1); -$763.89

† millions of U.S. dollars.
Countries in italics had definitive duties applied.
Countries with ** have agreed to undertakings.

by businesses.[19] In any case, neither of the two hypotheses developed in this paper is confirmed by the Canadian matrix.

Canada had a lower average number of cases per country (5) than either the United States (7) or Australia (9). Canada had more definitive duties (140) than Australia (115), but it imposed less than one-third as many price undertakings (10 versus 26).

The EC Antidumping Matrix

The analysis of the use of GATT antidumping trade law procedures by the EC can be viewed in Figure 5. The EC launched 222 cases against 19 countries, with an average balance of trade of US$529.34 million. The majority of cases were launched in the bottom half of the matrix in quadrants 2 and 4. All of the countries in those two quadrants had positive definitive duties applied, and all of the defender countries have agreed to price undertakings at one time or another. The EC is a special case, however, in the sense that it has used price undertakings in order to reach agreements on trade disputes with firms in the defender countries. Out of the 19 countries targeted for antidumping actions, all but three accepted a price undertaking. Seven of those countries have accepted price undertakings with no definitive duties being imposed against any of their other products. In the cases of the United States, Canada, and Australia, price undertakings usually occurred with countries where their other products had also received a definitive duty.

The EC also has had the highest average case load of the large four antidumping users, and it appears to have had a particular problem with those countries with centrally planned

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[19] For an overview of more traditional political-economy rationales for the use of trade law actions by firms, see R.W. Jones, ed., *International Trade: Surveys of Theory and Policy* (Amsterdam; New York: North Holland, 1986).

Figure 5

The European Community's Antidumping Cases, 1980–88

BALANCE OF TRADE

AVERAGE NO. OF CASES	**Positive**	**Negative**
≤ 12	1 (22) *Canada* *Sweden*** *Singapore* Austria** Australia** Switzerland** $17,022.44	3 (15) Finland** Hong Kong South Korea Norway** –$7,521.77
> 12	2 (108) *Czechoslovakia*** *Spain*** *Hungary*** *United States*** *Yugoslavia*** $10,216.44	4 (77) *Brazil*** *Japan*** *Poland*** *Romania*** –$19,187.78

TOTAL CASES: (222)

NET BALANCE OF TRADE: $529.34 †

Definitive duties: (53); Net balance of trade: –$7,070.11

Q1: (6); $1,901.22 Q3: (0); $0

Q2: (24); $10,216.44 Q4: (23); –$19,187.78

Undertakings: (105); Net balance of trade: $1,538.89

Q1: (9); $15,553.89 Q3: (3); –$5,043.66

Q2: (51); $10,216.44 Q4: (42); –$19,187.78

† millions of U.S. dollars.
Countries in italics had definitive duties applied.
Countries with ** have agreed to undertakings.

economies. Of the nine countries targeted in the bottom half of the matrix, five are socialist. As can be seen from Table 1, the EC brought between four and five times as many cases against the socialist countries as did the other three large antidumping users. In fact, the EC was responsible for 56.2 percent of all cases in that area. This could be due to the extensive two-way trade that has developed between these two groups of countries — a conclusion consistent with the outcome found in the Canadian case.

Other Countries' Antidumping Matrixes

Seven other countries have also made use of GATT antidumping procedures: Austria, Brazil, Finland, Mexico, New Zealand, South Korea, and Sweden. We analyzed the four largest of these antidumping users — Finland, New Zealand, Sweden, and South Korea; the results are presented in Appendix Figures A-1, A-2, A-3, and A-4. Of the four countries, only New Zealand brought a definitive duty — against China. The other three, however, have used price undertakings far more often. Finland imposed six price undertakings, while Sweden and South Korea each completed two. Finland and South Korea initiated all of their antidumping cases against countries with which they had an average trade deficit.

New Zealand and South Korea focused their antidumping cases primarily against Asian countries, while Finland and Sweden brought most of their cases against Eastern European countries. The average number of cases launched was, however, very low — only one to two cases per country targeted — and clearly too low to be able to test the validity of our hypotheses.

CVD Trade Law Results

Using the same framework developed to examine the use of GATT-reported antidumping cases, we also analyzed those countries — namely, Australia, Canada, Chile, the EC, New Zealand, and the United States — that have initiated CVD cases.[21] We should note that, as far as countervailing duties are concerned, our hypotheses can only be tested for the United States, since the number of CVD cases launched by the other countries was too small to derive any relevant policy implications as to the effect of the balance of trade on the initiation of such actions. It is still useful for descriptive purposes, however, to classify the CVD data in our matrix framework, as these countries and others are likely to continue using the CVD trade law option in the future.

The United States' CVD Matrix

The analysis of GATT-reported CVD cases initiated by the United States is presented in Figure 6. The United States has brought 263 CVD cases against 48 countries — an average of six cases per country.[22] Of those cases, 205 — 78 percent — were brought against countries that had an average trade deficit. These are located on the right-hand side of the matrix in quadrants 3 and 4, with 150 of them — or 56.8 percent of the total — in quadrant 4 alone. There were 182 cases brought against the 15 countries that had an above-average number of cases in quadrants 2 and 4. All of those countries were found under U.S. law to have subsidized the production of certain products, and were assessed definitive duties. The average total trade deficit for all the countries targeted for a CVD action was US$55,467.47 million. Quadrant 4 contributed US$41,559.56 million to the trade deficit, where-as quadrant 3 contributed only US$26,995.47 million over the same period. Thus, as was

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[21] Japan has also used CVD trade law, but only on one occasion — against Pakistan — and so it was dropped from our survey.

[22] One case against the EC was dropped from the analysis, since it double-counts the EC's balance of trade figures and the individual member nations of the EC are already included.

Figure 6

The United States' Countervailing Duty Cases, 1980–88

BALANCE OF TRADE

AVERAGE NO. OF CASES	**Positive**	**Negative**
≤ 6	1 (28) *Chile* *Columbia*** *Israel* *Netherlands* *Pakistan* *Turkey* Australia El Salvador East Germany Kenya Panama Poland Portugal $9,607.56	3 (55) *Austria* *Costa Rica*** *Ecuador* *India* *Iran* *Malaysia* *Philippines* *Saudi Arabia* *Sri Lanka* *Sweden* *Taiwan* *Thailand*** *Trinidad* *Venezuela* *Yugoslavia* *Zimbabwe* Czechoslovakia China Indonesia Singapore Uruguay –$26,995.47
> 6	2 (32) *Argentina* *Belgium/ Luxembourg*** *Spain* $3,480.00	4 (150) *Brazil*** *Canada*** *France* *West Germany* *Italy* *South Korea* *Mexico* *New Zealand* *Peru*** *South Africa* *U.K.* –$41,559.56

TOTAL CASES: (263)*

NET BALANCE OF TRADE: –$55,467.47 †

Definitive duties: (109); Net balance of trade: –$53,547.51

Q1: (10); $6,500.67

Q2: (16); $3,480.00

Q3: (25); –$21,968.62

Q4: (58); –$41,559.56

Undertakings: (10); Net balance of trade: –$15,930.11

Q1: (3); $72.44

Q2: (1); $2,485.00

Q3: (3); –$517.89

Q4: (3); –$17,969.67

*Excludes 1 case against the EC. With this EC case, quadrant 3 would have a balance of trade of –$33,911.24 and 56 cases.
† millions of U.S. dollars.
Countries in italics had definitive duties applied.
Countries with ** have agreed to undertakings.

the case with antidumping actions, the use of CVD laws by the United States confirms our two hypotheses.

The United States imposed 109 definitive duties over the 1980–88 period. Of these, 83 cases — 76 percent — were imposed against countries that had a trade deficit with the United States: 58 in quadrant 4, and 25 in quadrant 3. The average trade deficit for those countries was US$53,547.51 million. It should be noted that Japan does not appear in this matrix, as U.S. firms did not bring a single CVD action against Japan, despite that country's large bilateral trade surplus. Here again, no procedural bias based on the trade deficit is apparent. The United States accepted ten price undertakings. As with its acceptance of price undertakings on antidumping cases, it only accepted CVD price undertakings against countries that had other definitive duties applied against them. The average trade deficit of those countries that received price undertakings was US$15,930.11 million. Of all the cases initiated by the United States, 45.2 percent resulted in a definitive duty or a price undertaking.

Australia's CVD Matrix

The analysis of Australia's CVD cases can be seen in Figure 7. Australia brought 25 CVD cases against 12 countries, for an average of three cases per country. Only one country, New Zealand, had more than three cases. Australia had only one definitive duty — against Greece — but negotiated 10 price undertakings. Virtually all of Australia's CVD cases were against countries that contributed to an average trade deficit, and most are found in quadrant 3. The overall trade deficit for the countries targeted for a CVD action was US$3,855.57 million. The overall balance of trade for definitive duties was much smaller, and positive, at US$7.75 million. The average deficit on the balance of trade for price undertakings was also quite small, at US$140.76 million.

Figure 7

Australia's Countervailing Duty Cases, 1980–88

	BALANCE OF TRADE	
AVERAGE NO. OF CASES	**Positive**	**Negative**
≤ 3	1 Greece Argentina Netherlands (4) $48.08	3 Brazil** Finland** France** Italy** Norway** Denmark United States West Germany (12) –$4,218.87
> 3	2 New Zealand** (9) $315.22	4 (0) n.a.

TOTAL CASES: (25)

NET BALANCE OF TRADE: –$3,855.57 †

Definitive duties: (1); Net balance of trade: $7.75

Q1: (1); $7.75
Q3: (0); $0
Q2: (0); $0
Q4: (0); $0

Undertakings: (10); Net balance of trade: –$140.76

Q1: (0); $0
Q3: (5); –$455.99
Q2: (5); $315.22
Q4: (0); $0

† millions of U.S. dollars; n.a : not applicable.
Countries in italics had definitive duties applied.
Countries with ** have agreed to undertakings.

Canada's CVD Matrix

The analysis of the use of CVD actions by Canada can be seen in Figure 8. Canadian firms have rarely used the CVD trade law process, initiating only 13 cases, and no country had more than two cases launched against it. The average balance of trade for Canada's CVD cases was US$8,541.89 million. Once again, most of the cases fall into the left-hand side of the matrix, with Canada's largest trading partner, the United States, contributing to the positive average balance of trade.

Canada imposed definitive duties five times, for a positive balance of trade of US$8,613.22 million. It also imposed one price undertaking against the EC over the same period.

The EC's CVD Matrix

The analysis of the EC's CVD cases can be seen in Figure 9. The EC initiated five CVD cases against two countries: Spain, which is now a member of the Community, and Brazil. The EC imposed three definitive duties and no price undertakings. The total value of the deficit on the balance of trade was US$2,624.56 million. The total value of the deficit of the definitive cases was identical.

Other Countries' CVD Matrixes

Three other countries — Chile, Japan, and New Zealand — initiated CVD cases during the period under study. Japan initiated only one case, however, and has not been included in the analysis. The results for the other two countries can be seen in Appendix Figures A-5 and A-6. Most of the countries that Chile brought CVD actions against can be found in quadrant 1, where they contributed to an average trade surplus of US$318.80 million. However, most of Chile's cases were initiated against just three countries: Argentina, Brazil, and Spain.

These appear in quadrant 4, and contributed toward a trade deficit of US$76.21 million. As already indicated, because of the fear of retaliation from its major trading partners, Chile reached only one final CVD affirmative decision, which does not appear in the GATT data.

New Zealand launched five CVD cases. These fall into quadrant 3, and contributed to an average trade deficit of US$450.10 million. Not one of New Zealand's CVD cases resulted in a definitive duty or price undertaking.

Conclusions

We tested two hypotheses related to the effect of the country factor — specifically, the bilateral balance of trade — on the number of GATT-regulated antidumping and CVD cases initiated and on their outcomes. The first hypothesis states that a bilateral trade deficit will have a positive impact on the number of cases initiated, and on the relative number of cases with a positive finding. The second hypothesis proposes that a larger trade deficit will once again lead to a larger number of actions being initiated, and a larger relative number of cases being found positive.

From our analysis, we conclude that the two hypotheses are only valid for the United States and do not appear to hold for the other countries tested. They hold for the use of both antidumping and CVD actions by the United States. However, the results appear to be applicable only to the number of actions initiated, not to the relative number of positive outcomes. Hence, it is suggested that the "technical track" in U.S. trade law procedures is not directly influenced by whether there is a deficit or a surplus on the balance of trade. A possible explanation for this is that the initiators themselves — U.S. firms and the U.S. government — may be biased by the negative bilateral balance of trade with those countries targeted for antidumping and CVD actions. This may be the result of an

Figure 8

Canada's Countervailing Duty Cases, 1980–88

	BALANCE OF TRADE	
AVERAGE NO. OF CASES	Positive	Negative
≤ 2	1 (4) *Brazil* *United States* Netherlands $9,635.00	3 (9) *Denmark* *France* *Spain* Italy Austria Ecuador Finland Switzerland –$1,093.11
> 2	2 (0) n.a.	4 (0) n.a.

TOTAL CASES: (13)*

NET BALANCE OF TRADE: $8,541.89 †

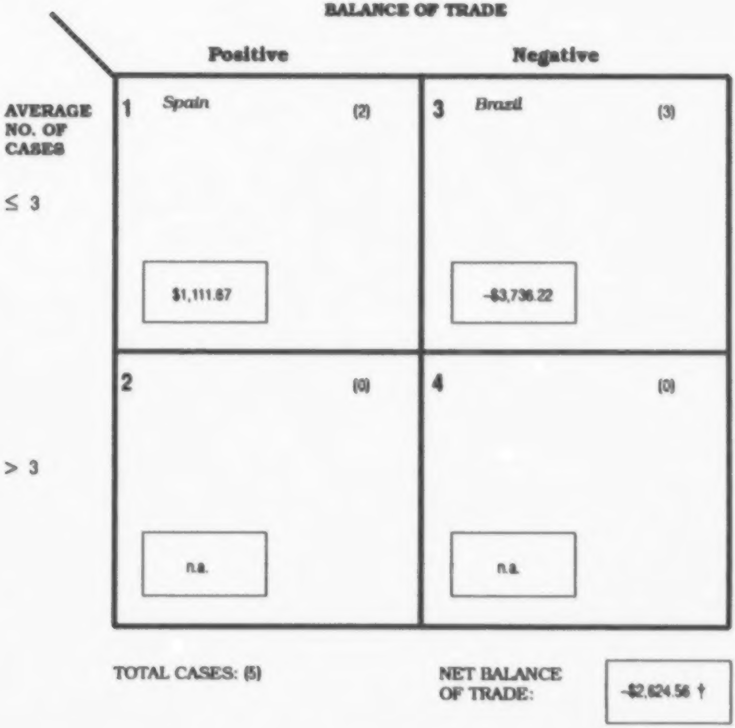
Definitive duties: (5); Net balance of trade: $8,613.22
Q1: (2); $9,139.22 Q3: (3); –$526.00
Q2: (0); $0 Q4: (0); $0

Undertakings: (1); Net balance of trade: –$755.00 (against the EC)
Q1: (0); $0 Q3: (1); –$755.00
Q2: (0); $0 Q4: (0); $0

*Excludes 2 cases against the EC. With these EC cases, quadrant 3 would have a balance of trade of –$1,848.00 and 11 cases.
† millions of U.S. dollars; n.a : not applicable.
Countries in italics had definitive duties applied.
Countries with ** have agreed to undertakings.

Figure 9

The European Community's Countervailing Duty Cases, 1980–88


BALANCE OF TRADE
Positive
Negative
AVERAGE NO. OF CASES
≤ 3
> 3
1
Spain
(2)
$1,111.67
3
Brazil
(3)
-$3,736.22
2
(0)
n.a.
4
(0)
n.a.
TOTAL CASES: (5)
NET BALANCE OF TRADE:
-$2,624.56 †

Definitive duties: (3); Net balance of trade: -$2,624.56

Q1: (1); $1,111.67 Q3: (2); -$3,736.22

Q2: (0); $0 Q4: (0); $0

Undertakings: (0); Net balance of trade: $0

Q1: (0); $0 Q3: (0); $0

Q2: (0); $0 Q4: (0); $0

† millions of U.S. dollars; n.a : not applicable.
Countries in italics had definitive duties applied.
Countries with ** have agreed to undertakings.

ethnocentric mentality prevailing in the United States that foreign countries can only be successful in the U.S. market if they are engaging in "unfair" trade practices.[23]

Finally, the results discussed above do not imply that other countries are unbiased in their use of "unfair" trade laws, only that they are not directly influenced by the bilateral balance of trade. A strong bias at the industry or firm level cannot be ruled out,[24] but such levels were not the focus of this paper.

Further work is required in analyzing the use of GATT antidumping and CVD laws at the industry level, both by initiating firms and by defending firms, since in the majority of cases it is firms that initiate the use of trade remedy laws. The GATT data are not sufficient to do this, since they provide only broad country-level data. Better sources of data are the records kept by the relevant agencies or government departments in the countries that use these trade laws. Since the GATT requires that only like-products be tested, an examination of the trade flows of the products under examination — as well as of the actual case results against individual firms and their competitors engaged in unfair trading — could shed more light on the interest-group, trade-law-capture argument.

Another consideration requiring more work is the way in which government bureaucracies cope with their country's trade problems. Are mechanisms such as quasi-judicial agencies, bifurcated testing of "material injury", and testing for dumping and subsidy margins — as exemplified by the U.S. and Canadian systems — appropriate for all nations, or only for some?

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[23] See, for example, David B. Yoffie and Helen V. Milner, "Between Free Trade and Protectionism: Strategic Trade Policy and a Theory of Corporate Demands," *International Organization* 43 (Spring 1989); and idem, "Why Corporations Seek Strategic Trade Policy," *California Management Review* 31 (Summer 1989): 113–131. For an overview of U.S. ethnocentrism, see Prestowitz, *Trading Places*, particularly chapter 3.

[24] This has already been demonstrated for the United States by Feinberg and Hirsch, "Industry Rent Seeking and the Filing of 'Unfair Trade' Complaints."

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Figure A-1

Finland's Antidumping Cases, 1980–88

	BALANCE OF TRADE	
AVERAGE NO. OF CASES	**Positive**	**Negative**
≤ 2	1 (0) n.a.	3 (6) Austria Switzerland** Czechoslovakia West Germany** Romania –$814.33
> 2	2 (0) n.a.	4 (7) East Germany Poland** –$163.00

TOTAL CASES: (13)

NET BALANCE OF TRADE: –$977.33 †

Definitive duties: (0); Net balance of trade: $0

Q1: (0); $0

Q3: (0); $0

Q2: (0); $0

Q4: (0); $0

Undertakings: (6); Net balance of trade: –$876.44

Q1: (0); $0

Q3: (3); –$724.00

Q2: (0); $0

Q4: (3); –$152.44

† millions of U.S. dollars; n.a : not applicable.
Countries in italics had definitive duties applied.
Countries with ** have agreed to undertakings.

Figure A-2

New Zealand's Antidumping Cases, 1980–88

	BALANCE OF TRADE	
AVERAGE NO. OF CASES	**Positive**	**Negative**
≤ 1	1 *China* Malaysia Thailand (3) $184.61	3 West Germany (1) -$155.89
> 1	2 (0) n.a.	4 (0) n.a.

TOTAL CASES: (4)

NET BALANCE OF TRADE: $28.72 †

Definitive duties: (1); Net balance of trade: $123.72

Q1: (1); $123.72
Q2: (0); $0
Q3: (0); $0
Q4: (0); $0

Undertakings: (0); Net balance of trade: $0

Q1: (0); $0
Q2: (0); $0
Q3: (0); $0
Q4: (0); $0

† millions of U.S. dollars; n.a : not applicable.
Countries in italics had definitive duties applied.
Countries with ** have agreed to undertakings.

Figure A-3

Sweden's Antidumping Cases, 1980–88

AVERAGE NO. OF CASES	BALANCE OF TRADE Positive	BALANCE OF TRADE Negative
≤ 1	1 Czechoslovakia** Yugoslavia (2) $100.44	3 South Korea Poland** (2) −$142.56
> 1	2 (0) n.a.	4 (0) n.a.

TOTAL CASES: (4)

NET BALANCE OF TRADE: −$42.11 †

Definitive duties: (0); Net balance of trade: $0

Q1: (0); $0
Q2: (0); $0
Q3: (0); $0
Q4: (0); $0

Undertakings: (2); Net balance of trade: −$55.89

Q1: (1); $4.78
Q2: (0); $0
Q3: (1); −$60.67
Q4: (0); $0

† millions of U.S. dollars; n.a : not applicable.
Countries in italics had definitive duties applied.
Countries with ** have agreed to undertakings.

Figure A-4

South Korea's Antidumping Cases, 1980–88

AVERAGE NO. OF CASES	BALANCE OF TRADE: Positive	BALANCE OF TRADE: Negative
≤ 2	1 (0) n.a.	3 Taiwan** (1) –$87.14
> 2	2 (0) n.a.	4 Japan** (3) –$3,443.67

TOTAL CASES: (4)

NET BALANCE OF TRADE: –$3,530.81 †

Definitive duties: (0); Net balance of trade: $0
Q1: (0); $0 Q3: (0); $0
Q2: (0); $0 Q4: (0); $0

Undertakings: (2); Net balance of trade: –$3,530.81
Q1: (0); $0 Q3: (1); –$87.14
Q2: (0); $0 Q4: (1); –$3,443.67

† millions of U.S. dollars; n.a : not applicable.
Countries in italics had definitive duties applied.
Countries with ** have agreed to undertakings.

Figure A-5

Chile's Countervailing Duty Cases, 1980–88

	BALANCE OF TRADE	
AVERAGE NO. OF CASES	**Positive**	**Negative**
≤ 10	1 China Columbia Japan South Korea Mexico Portugal Taiwan Uruguay (19) $318.80	3 East Germany (1) not available
> 10	2 Peru (16) $16.56	4 Argentina Brazil Spain (97) –$76.21

TOTAL CASES: (133)*

NET BALANCE OF TRADE: $259.15 †

Definitive duties: (0); Net balance of trade: $0

Q1: (0); $0
Q2: (0); $0
Q3: (0); $0
Q4: (0); $0

Undertakings: (0); Net balance of trade: $0

Q1: (0); $0
Q2: (0); $0
Q3: (0); $0
Q4: (0); $0

*Excludes 6 cases against the EC. With these EC cases, quadrant 1 would have a balance of trade of $1,029.83 and 25 cases.
† millions of U.S. dollars; n.a : not applicable.
Countries in italics had definitive duties applied.
Countries with ** have agreed to undertakings.

Figure A-6

New Zealand's Countervailing Duty Cases, 1980–88

	BALANCE OF TRADE	
AVERAGE NO. OF CASES	**Positive**	**Negative**
≤ 1	1 (0) n.a.	3 Canada West Germany Netherlands Australia Austria (5) –$450.10
> 1	2 (0) n.a.	4 (0) n.a.

TOTAL CASES: (5)

NET BALANCE OF TRADE: –$450.10 †

Definitive duties: (0); Net balance of trade: $0

Q1: (0); $0 Q3: (0); $0

Q2: (0); $0 Q4: (0); $0

Undertakings: (0); Net balance of trade: $0

Q1: (0); $0 Q3: (0); $0

Q2: (0); $0 Q4: (0); $0

† millions of U.S. dollars; n.a : not applicable.
Countries in italics had definitive duties applied.
Countries with ** have agreed to undertakings.

A Comment

Katie Macmillan[*]

Andrew Anderson and Alan Rugman break new ground by attempting an analytical formulation of a topic that previously has been approached in a strictly anecdotal fashion. The tabulation of past trade actions by user and recipient countries speaks volumes about how and by whom trade remedies are used. As such, it is tremendously useful to theorists and practitioners alike. The authors' future work will examine cases according to broad industrial groupings and will provide more knowledge in this area.

Although I applaud the analytical approach that Anderson and Rugman take, I have difficulty with their basic thesis and how they set out to test it. The question of bias in the administration of trade law is an important one, but I have doubts about whether the Anderson-Rugman model is the best method of investigating its existence. I also question the authors' concern with country-level bias and wonder if other types of bias are both more serious and more apparent.

In commenting on the paper, I begin by asking whether the methodology that Anderson and Rugman employ is capable of testing for country level-bias in the use of trade laws. I then propose a different approach and another set of factors that could shed light on the questions the authors pose. Finally, I attempt to draw some conclusions from the analysis that could assist both current users of antidumping and countervailing duty provisions and those countries that are in the process of implementing systems of their own.

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[*] I am indebted to my colleagues, John Coleman, Robert Bertrand, and Charles Gracey, for their excellent suggestions on this paper. Any errors in fact or logic remain mine alone.

My first question is whether the model is capable of testing for country-level bias or whether it merely explores a rather obvious correlation. Regarding hypothesis one, it seems to me rather inevitable that exporting countries that contribute to balance of payments deficits attract a large number of trade actions. This arises because substantial import penetration is an important factor in material-injury determinations. One must have imports to find material injury and it helps if the magnitudes are large. An observed correlation between balance of trade performance and the number of trade actions does not necessarily indicate ethnocentric behavior or the kind of bias suggested by the authors in their conclusion. It simply underlines the obvious: that parties seeking relief under trade remedy laws will focus their attention on those exporters who have made the greatest inroads into domestic markets.

The fact that the model's results do not bear out this intuitive correlation for hypothesis one — except for the case of the United States — can probably be traced to problems of data and specification. For the trade variable, trade flows instead of net trade balances might be a better predictor of trade actions initiated. For Canada, import shares might be better still.

Difficulties also exist in quantifying the number and outcome of trade actions due to the diverse nature of trade cases. Disaggregating the data into broad industrial groupings — heavy industrial goods, agricultural products, and so on — would help to capture distinct patterns that follow industrial lines. But even this cannot correct the fact that trade laws quite often are used to seek relief for the narrowest range of products imported from the widest range of countries. Examples from the Canadian International Trade Tribunal's (CITT) current case load include imports of municipal tractors from West

Germany, photo albums with self-adhesive leaves from eight countries, and carbon-steel plate — a C$750–800 million industry — and a finding involving imports from 11 countries. Unless some allowance is made for the industry size and the number of products covered by the action, the data analysis can become misleading.

Another case in point is the practice of cumulation. According to the cumulation principle, even a very minor exporter can be included in an action or finding because its own exports, combined with exports from other named sources, contribute to the injury suffered. Cumulation is more prevalent in antidumping cases, but can arise in combined antidumping and countervailing duty actions. It is unlikely to arise in agricultural cases, but is common in industrial-goods cases, such as steel, that may involve as many as twelve countries covered by a single finding. In short, the number of cases — and hence the model's results — will be affected by the type of product, the size of the industry, and the number of exporters covered by the finding.

Even with fine-tuning of the key variables, however, I believe the model would still fail to deliver what the authors ask of it. We simply cannot be assured that any correlation found to exist between a size or direction of trade variable and a variable measuring the number or outcome of trade actions is attributable to country-level bias and not to some legitimate relationship between the two.

If the objective is to take an analytical approach to the question of bias, the authors appear to have little choice but to construct a "counterfactual," as suggested by Ron Cass and Warren Schwartz in the discussion following this presentation. Simply put, this would involve creating a world that initiates and resolves trade actions precisely as the GATT code requires, and then looking for deviations from that ideal. The model developed would probably more closely resemble the type of econometric work conducted by Patrick Messerlin for the World

Bank. It could make trade actions a function of a variety of explanatory variables and assign dummy variables to capture bias in the system. While this approach would pose numerous data and specification challenges, I believe it is the only way to ensure that patterns of bias can be separated from the complex correlations that already exist.

In looking for bias, I see no reason to restrict the search to only country-level bias. Bias may also exist with respect to certain industrial sectors or certain indicators of injury. For example, it might be easier to find dumping in the case of agricultural products than for industrial goods, or the impact of imports on domestic production could be overexaggerated by failing to account for export performance of the domestic industry.

My view is that questions of bias in the administration of trade law can be discerned much better from an examination of institutions and practices of the countries involved. This should be our primary attention of focus.

Several examples of institutional or procedural bias can be cited. Price undertakings — a common practice in the European Community — are a case in point, since a verdict is rendered without a hearing and airing of evidence and arguments. While some parties might agree to undertakings simply to avoid the expense and inconvenience of a hearing, the danger is that they submit because they perceive the outcome is stacked in favor of the domestic industry.

Many other examples of institutional bias exist. In Canada and the United States, different bodies decide on the margin of dumping or subsidization and the determination of material injury. Other countries make these two determinations through a single entity that acts as both judge and jury in these important issues.

Conduct of hearings also raises questions of bias. Is there provision for public hearings involving all interested parties? What sort of time limits exist for presentation of evidence and argument? Is cross-examination allowed? Can the public interest be taken into account? Can one appeal to a higher level court, and on what grounds is appeal allowed?

Another issue in trade law administration concerns the expiration of findings. In Canada, findings under the *Special Import Measures Act* automatically expire after five years unless reviewed by the CITT. This type of "sunset" provision is not universal among signatories to the GATT's Antidumping and Countervailing Duty Code. In Canada's experience, less than 50 percent of findings in place for five years are deemed to be still necessary. This raises many questions about findings that continue indefinitely in the United States and in other countries lacking "sunset" provisions.

Questions such as these alert us not only to bias in the use of trade laws. By focusing on the institutions and practices, we also learn important lessons about their design. These lessons are especially relevant in the context of the Uruguay Round negotiations and in light of the new signatories to the GATT's Antidumping and Countervailing Duty Code who will be establishing institutions and practices to deal with trade disputes.

In closing, I applaud the authors for tackling this important issue and for attacking it analytically. Their work takes a worthwhile first step into an area that shows great promise. It is only by scrutinizing the administration of trade law that we will improve the quality of its application and administration.

A Comment

David Barrows and Alvaro Del Castillo

In their paper, Andrew Anderson and Alan Rugman address the important issue of potential bias in the application of trade remedy actions.

In the neo-classical economic environment, dumping and subsidization should not be an issue in the longer term. Efficiency arguments would require that optimal economic behavior would apply. Therefore, it should not be possible to sustain uneconomic dumping and subsidy behavior in the longer run. However, even if this were true, subsidy and dumping actions could still cause short-run dislocations in domestic labor and capital markets, as well as distortions in international trade. A principal rationale for unfair trade remedy laws is to safeguard the principle of comparative advantage in international trade from noncompetitive practices, thus ensuring fairness in international trade activity.

In recent years, there has been a significant increase in the use of trade remedy laws. Many analysts, including Rugman, have raised concerns that this increase is not solely due to nations' efforts to deal with the unfair trading practices of trade partners. Rather, the increase in the number of antidumping and countervailing duty (CVD) cases may reflect the increasing strategic use of these laws to advance national industrial policy goals by means of trade law actions. If this is the case, then the Anderson-Rugman study is timely and represents a useful contribution.

Using a two-dimensional matrix, the authors assess systematic country bias in the application of antidumping and

CVD laws. They conclude that the United States is the only country where this bias can be established.

Simply put, if a country runs a balance of trade surplus with the United States, it is likely to face more U.S.-initiated CVD and antidumping cases and a greater likelihood of positive determinations than if it has a negative balance of trade with the United States. Furthermore, the larger the trade surplus with the United States, the greater is the likelihood of a larger number of cases initiated and the possibility of positive determinations. We would like to discuss some of the major issues in the Anderson-Rugman paper with respect to methodology and to broader trade policy implications.

With respect to methodology, it is unclear that a two-dimensional matrix can effectively capture all of the potential for bias in the application of domestic trade remedy laws. As the authors acknowledge, it might also be useful to assess other variables in order to determine whether systematic bias has occurred. For example, it might be useful to assess the relative size of the cases, both positive and negative. It may be found, for example, that cases cluster in a number of key sectors.

As well, the matrix approach does not allow for the assessment of any temporal effects on the relationship under investigation, yet a cursory assessment would indicate that temporal factors play an important role in the application of U.S. CVD and antidumping laws.

As the accompanying table indicates, there is substantial variability in the number of cases initiated over the 1981–89 period; at the same time — at least until 1987 — the United States' balance of trade progressively deteriorated.

This variability may be more indicative of the cyclical performance of specific industries, rather than the overall competitiveness of the U.S. economy as reflected in the United States' balance of trade with any single country.

Furthermore, U.S. trade laws have been substantially transformed since 1980 because of congressional actions — for

Investigations Initiated against Other Countries under Selected U.S. Trade Remedy Laws, 1981–89

	Antidumping cases	**Countervailing duty cases**	**Total cases**	**Total balance of trade** (US$ billions)
1981	19	15	34	– 39.6
1982	68	124	192	– 36.5
1983	47	34	81	– 62.0
1984	48	42	90	– 108.0
1985	60	40	100	– 129.0
1986	68	28	96	– 144.5
1987	18	7	25	– 152.1
1988	39	13	52	– 118.5
1989	26	9	35	– 108.6

Source: Case data from U.S. International Trade Commission, Public Information offices; and U.S. Department of Commerce. Balance of trade data from Statistics Canada.

example, the *Trade Act of 1988* — and new interpretations and precedents — such as the 1982 and 1986 softwood lumber CVD cases against Canada. A system of U.S. trade laws that is more accessible to its industries, coupled with a greater likelihood of a positive determination due to political pressures arising from a ballooning total U.S. trade deficit, might be more responsible for any bias in the application of U.S. trade law.

If it is found that positive cases tend to be relatively large and to occur in a number of key, yet import-vulnerable sectors, this might suggest the presence of a significant bias in the application of trade remedy rules. In fact, U.S. trade laws in general are written to allow substantial interpretive power to the administering authorities.

Methodologically, the addition of these factors could be analyzed by means of econometric modeling, or through an attempt to determine consistent patterns of clustering through factor-type analyses. The development of a behavioral model could assist in predicting likely behaviour as a result of changes in one or more of the explanatory variables.

The application of U.S. trade remedy laws may constitute a component of a wider strategy to manage trade. For example, in recent years, fairly traded Canadian steel has been subjected to actual trade harassment in the form of a number of U.S.-initiated CVD and antidumping cases. The initiation of these cases can represent a significant cost burden to targeted companies. CVD and antidumping actions can be disruptive to business development by negatively impacting on short-run export decisions, as well as on long-run decisions to invest in additional production capacity.

The Canadian steel industry is an example of an industry that is highly integrated with, and dependent on, the requirements of North American auto production. Canadian steel contracts for such production could be lost to U.S. steel producers as a result of the threat of trade remedy actions, and could lead to possible disruptions in the development of further integrated and efficient production processes in the North American context.

For these reasons, industries may agree to the relative stable environment that results from voluntary restraint agreements (VRAs), rather than face continued threat of trade law actions and the resulting associated business uncertainties. These VRAs are trade distorting and may be the direct result of bias in the administration of antidumping and countervailing duty actions in the United States.

Anderson and Rugman provide interesting findings, especially with respect to the United States and its use of trade remedy laws. Not only is the United States the largest user of these actions, but the authors also suggest there is systematic bias in the application of these laws to U.S. trading partners.

However, these findings may underestimate the impact of U.S. discriminatory practices. In fact, in conjunction with VRA-type arrangements, this may represent part of a broader regime to restrict imports, especially from countries having a negative trade balance with the United States. For this reason, it would appear necessary and desirable to restrain this use of CVD and antidumping rules in the current round of GATT negotiations.

PART II

Reforming International Trade Remedy Laws

GATT Safeguards Reform: The Injury Test

Alan O. Sykes

Article XIX of the General Agreement on Tariffs and Trade (GATT) allows signatories to suspend GATT obligations when "increased quantities" of imports "cause or threaten serious injury to domestic producers" of competing products, "to the extent and for such time as may be necessary to prevent or remedy such injury."[1] In GATT parlance, a protective measure under Article XIX is a "safeguards" action. Article XIX is also termed the GATT "escape clause," as it allows signatories to "escape" from their GATT commitments.

A growing international consensus holds that Article XIX warrants revision, and the safeguards issue is prominent on the agenda for the current Uruguay Round of GATT negotiations. The bulk of the reform proposals to date emphasize measures to restrict "selectivity" in the use of safeguards measures, and to bring "gray area" actions, such as voluntary restraint agreements, within the formal ambit of Article XIX.[2] Related proposals emphasize changes in the compensation and retaliation provisions of Article XIX to reduce the incentive for signatories to circumvent the rules of the GATT.[3] By contrast, relatively little attention has been paid to the major precondition for safeguards action under Article XIX — the "injury test," which requires the existence of "serious injury" in the import-competing industry and a causal relation between the injury and increased imports.

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[1] General Agreement on Tariffs and Trade, Article XIX(1) (1947).

[2] See, for example, Gary Sampson, "Safeguards," in J. Finger and A. Olechowski, eds., *The Uruguay Round: A Handbook On the Multilateral Trade Negotiations* (Washington, D.C.: World Bank, 1987); J. David Richardson, "Safeguards Issues in the Uruguay Round and Beyond," in R. Baldwin and J. Richardson, eds., *Issues in the Uruguay Round* (Cambridge, Mass.: National Bureau of Economic Research, forthcoming).

[3] See, for example, R. Lawrence and R. Litan, *Saving Free Trade* (Washington, D.C.: Brookings Institution, 1986).

This paper offers some tentative proposals for modification of the injury test. In particular, it suggests that findings of "serious injury" should be limited to cases of serious labor market dislocation — the emergence of sustained unemployment or underemployment in the import-competing industry — understood broadly to encompass both dislocated workers and dislocated small business proprietors. The paper also urges new restrictions on the circumstances in which imports may be deemed a "cause" of serious injury. These restrictions are designed to ensure that safeguards measures are not employed when labor market dislocation results principally from recession or from increases in costs of production in the importing nation. Such reforms would reduce the extent to which safeguards measures merely shift labor market dislocation from country to country.

The Injury Test under Current Practice

Article XIX provides in pertinent part:

> If...any product is being imported into the territory of [a] contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the contracting party shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession.[4]

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[4] The omitted text at the beginning of the paragraph suggests that "increased quantities" of imports must result form "unforeseen developments" and "the effects of the obligations incurred" under the GATT. Both of these...

The GATT does not define the term "serious injury," leaving to each signatory the opportunity to interpret the term as it sees fit. Further, when a signatory determines that its industry has suffered serious injury, it is entitled to the benefit of any "reasonable doubt" on the matter in the event of a dispute about the applicability of Article XIX.[5] Accordingly, the GATT places little restriction upon the circumstances in which a signatory may conclude that "serious injury" exists or is threatened. Virtually any indicator of "injury" may be relied upon — declining prices, profits, output, employment, capacity, capacity utilization, and so forth.[6]

When "serious injury" is found, the inquiry proceeds to causation —the injury must result from "increased quantities" of imports. This provision raises serious conceptual problems. To say that "increased quantities" of imports are a cause of "injury" is to imply that changes in the quantity of imports can sensibly be viewed as a causal variable. Yet, to an economist, the quantity of imports is endogenous (originating from within) rather than exogenous (externally originating) — an "effect" rather than a "cause" — determined in equilibrium by the interplay of supply and demand forces at home and abroad. The underlying determinants of supply and demand — consumer tastes and incomes, technology, input prices at home and abroad, and so forth — may thus be viewed as causal variables. But the quantity of imports and, *a fortiori*, changes

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...prerequisites for safeguards action are now ignored in practice. For further discussion, see Alan O. Sykes, "Protectionism as a 'Safeguard': A Positive Analysis of GATT Article XIX with Normative Speculation," *University of Chicago Law Review* (forthcoming, 1991).

[5] See GATT Contracting Parties, *Report on the Withdrawal by the United States of a Tariff Concession Under Article XIX of the GATT* (Geneva: GATT, 1951), p. 23.

[6] See, for example, 19 U.S.C. Section 2252(c), which lists the myriad factors that may be taken into account under U.S. law in determining whether serious injury or threat thereof exists.

in the quantity of imports, do not "cause" conditions in the domestic industry.

One way to avoid this conceptual difficulty with the "increased quantities" requirement of Article XIX is to ignore it. "Increased quantities" of imports might be deemed the "cause" of injury if conditions that reflect injury happen to arise at a time when imports are rising. Of course, a temporal coincidence between increased quantities of imports and injury does not establish a causal relation between them. But this distinction may be swept under the rug — one GATT working party did just that.[7] Present GATT practice thus allows that an increase in either the absolute volume or the market share of imports, coincident with deterioration in the condition of the domestic industry, may support a determination that the "increased quantities" requirement has been satisfied.[8] The United States, for example, routinely relies on a coincidence between rising imports and indications of industrial injury to support escape clause relief under domestic law.[9]

Another possible solution to the conceptual difficulty with the "increased quantities" requirement is to inquire whether injury would have been avoided if protection had been in place. That is, "increased quantities" might be deemed the cause of injury if a quota restricting imports to their level or market share prior to the observed "increase" would have avoided the injury. In other words, increased imports are a cause of injury if protection would have averted injury. Such a construction, of course, allows the "increased quantities" requirement to be satisfied rather easily.

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[7] See GATT Contracting Parties, *Report on Withdrawal.*

[8] See Kenneth W. Dam, *The GATT* (Chicago: University of Chicago Press, 1970), p. 102.

[9] See, for example, United States International Trade Commission, *Wood Shakes and Shingles form Canada* (Washington, D.C., 1986), pp. 13–14; and idem, *Carbon and Certain Alloy Steel Products* (Washington, D.C., 1984), p. 69.

Yet a third approach is to read "increased quantities" as "downward shift of the import supply curve." A minority of the U.S. International Trade Commission has adopted a similar approach to the construction of the escape clause under U.S. law. The U.S. statute provides that a domestic industry may obtain protection only if "increased quantities" of imports are a "substantial cause" of injury to competing U.S. producers,[10] where "substantial cause" means "a cause which is important and not less than any other."[11] This statute raises even greater conceptual difficulties than the "increased quantities" requirement of Article XIX.[12] To resolve some of these difficulties, a few of the commissioners posit in each investigation that injury may be attributed to one of three "causes" — shifts in domestic demand, shifts in domestic supply, and shifts in import supply. The domestic industry may obtain relief only if shifts in the import supply curve have caused greater injury over some relevant period of time than shifts in domestic demand and supply during the same period.[13]

All of these interpretations appear permissible under current GATT practice. Under either of the first two, signatories can readily invoke Article XIX when declining domestic demand or recession is primarily responsible for injury. Such declines in demand frequently cause an increase in the market share of imports because foreign suppliers are relatively more efficient than domestic suppliers, and thus generate a temporal coincidence of "increased quantities" with injury. Likewise, a hypothetical quota to prevent an increase in the market share of imports might avoid much of the injury owing to the decline in demand.

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[10] See 19 U.S.C. Section 2252(b) (1)(A).

[11] 19 U.S.C. Section 2252(b) (1)(B).

[12] For example, is a recession a cause of injury that might be more important than imports? Or is a recession due to a multitude of causes — fiscal policy, monetary policy, what Alan Greenspan had for breakfast— each of which must be weighed individually against imports under the "substantial cause" test? Is appreciation of the dollar a distinct cause of injury to be weighed against imports? Or is it simply an explanation for why imports increased, an issue of no concern under the statute?

[13] See, for example, United States International Trade Commission, *Wood Shakes and Shingles from Canada*, pp. 55-73 (views of Commissioners Liebeler and Brunsdale).

Signatories can also invoke Article XIX when difficulties in the importing industry are attributable to rising domestic costs of production. Such a cost increase can precipitate an increase in imports, either absolutely or relatively, and again produce a temporal coincidence between rising imports and indicators of injury. Further, a hypothetical quota restricting the volume or share of imports to an earlier level might avoid much of the injury owing to rising domestic costs.

The Economic Justification for an Escape Clause in the GATT

To evaluate the wisdom of the injury test under current practice, one must begin with a theory of the proper function of an escape clause in the GATT.[14]

Although the years immediately following the World War II were hospitable to trade liberalization and thus to the formation of the GATT, the GATT negotiators were not so foolish as to suppose that protectionist sentiments would not revive as economic conditions changed. They further recognized that irrevocable commitments to liberalize trade might at some point preclude them — or their superiors, or their political successors in interest — from providing protection in circumstances where the political rewards would be great. The negotiators thus preserved the opportunity to revoke their GATT commitments in the future.

Article XIX is only one device for the avoidance of GATT obligations. Article XXVIII, for example — the most important provision in this regard — provides general authorization for the renegotiation of tariff bindings, including the authority to modify concessions even if negotiations over compensation break down. Articles XX, XXI, and XXV also provide devices for the avoidance of commitments.

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[14] This issue is the subject of an earlier paper of mine. See Sykes, "Protectionism as a 'Safeguard'."

Presumably, this system of revocable commitments was thought best by the agents who bound their nations to GATT. For whatever those agents hoped to achieve in the negotiations, parties to any agreement have an incentive to strike a bargain that is Pareto optimal from their perspective. Each provision of such an agreement has the property that no substitute provision, coupled with an adjustment in other terms of the agreement, will allow some parties to benefit while leaving the rest indifferent to the change. In this sense, Article XIX is likely an "efficient" provision, or at least was thought to be an efficient provision when it was drafted.

This proposition has considerable explanatory power. Among other things, it provides insight into the existence and content of the injury test. A Pareto optimal agreement will allow "escape" from obligations when the gains to the "escaping" party outweigh the costs to other parties. Prior work on the political economy of protection suggests that the domestic pressures for protection reach their zenith when import-competing industries are suffering financially. Thus, "escape" is most likely to be Pareto efficient from the perspective of the negotiators when an importing industry is suffering severe difficulties, and exporters who would be affected adversely by safeguards measures are doing relatively well. The requirement of "serious injury" in the importing industry plainly relates to the first of these considerations. Likewise, the requirement of a causal linkage to "increased quantities" of imports roughly captures circumstances in which overseas exporters are doing reasonably well — circumstances where their sales abroad are expanding or their market share is rising.

To say that Article XIX is Pareto optimal from the perspective of the agents who negotiated it, however, hardly establishes its ultimate wisdom. Negotiators act out of political self-interest — or, more precisely, that of their superiors — which need not correspond to any principled measure of the public interest. Thus, Article XIX may simply represent a manifestation of "agency costs," and serve only to preserve opportunities for rent seeking and rent extraction in the political arena.

Indeed, it is impossible to fashion a persuasive "first-best" justification for escape clause measures. Neither an appeal to considerations of economic efficiency nor an appeal to distributional equity affords a convincing rationale for protecting "injured" industries, even ignoring the interests of trading partners.[15] And once the adverse effects of safeguards measures on exporting countries are considered as well, it follows *a fortiori* that a "first-best" GATT would embody irrevocable commitments to trade liberalization, and omit provisions such as Article XIX.

But the first-best world is unattainable, and in practice where trade policy is fashioned by self-interested political actors, a GATT escape clause may indeed play a desirable role. Kenneth Dam made the argument two decades ago — his defense of Article XIX is the suggestion that it facilitates trade concessions.[16] The argument starts from the implicit premise that trade liberalization enhances social welfare. But elected officials or their subordinates may decline to pursue trade liberalization initiatives out of political self-interest even if the political consequences appear favorable at the time of the negotiations. Unanticipated changes in economic conditions may create circumstances in which the political rewards to an increase in protection — or the political costs of an irrevocable commitment to reduce protection — are great. For this reason, in the absence of an escape clause, trade negotiators may decline to make certain reciprocal concessions for fear of adverse political consequences in the future. With an escape clause in place, by contrast, the negotiators will agree on a greater number of reciprocal concessions, knowing that those concessions can be avoided later if political conditions so dictate. Article XIX is then a desirable component of GATT, the argument runs, because it increases the number of reciprocal trade concessions and thus lowers the level of protection over time. The implicit assumption is that the benefits of the additional initial concessions more than counterbalance the costs of later protectionist measures pursuant to Article XIX. Casual empiricism tends to support this implicit assumption — the number of safeguards actions is quite small in relation to the scope of GATT tariff concessions.

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[15] See, for example, Lawrence and Litan, *Saving Free Trade*.

[16] See Dam, *The GATT*, p. 99. See also J. Barton and B. Fisher, *International Trade and Investment* (Boston: Little, Brown, 1986), pp. 213–214; and Lawrence and Litan, *Saving Free Trade*, pp. 23–27, for arguments that the escape clause under U.S. law serves as a safety valve for political pressures that would otherwise produce major protectionist initiatives in Congress.

If correct, Dam's argument has several important implications. It implies that safeguards reform may actually be undesirable, even under the optimistic assumption that it is feasible. Additional constraints upon the ability of signatories to "escape" their obligations may discourage trade concessions to such an extent that the level of protection rises in the long run.

Moreover, Article XIX(2) requires that a country proposing to take safeguards measures must negotiate with other signatories over the possibility of offsetting concessions. Such negotiations often lead to "compensation" in the form of a reduction of trade barriers in other sectors, so that the effect of a safeguards action upon the overall level of protection may be quite modest. To this extent, reform of the safeguards regime may yield little economic benefit to the trading community.

But these arguments against tinkering with the safeguards regime are not entirely persuasive. First, the escape clause that the negotiators draft for themselves may well allow "escape" more often than is necessary to facilitate agreement on concessions. Concessions will be made as long as the bargain gives the negotiators at least their reservation utility. Yet if negotiators design the escape clause to maximize their utility — or their superiors' utility — from trade concessions, the result will likely be an agreement that yields more than the necessary reservation utility. This observation yields some basis for optimism that incremental restrictions upon the escape clause will not thwart future trade concessions.[17]

Further, the proposition that safeguards actions do not harm the welfare of the trading community because "compensation" is often paid, neglects the fact that compensation often takes the form of quota rents rather than offsetting trade concessions. When the importing nation negotiates voluntary restraint agreements with exporting nations, the exporters receive "compensation" in the form of an opportunity to sell at an artificially inflated price in the importing nation, and this opportunity may well appease exporting interests even though the effect of the system on the economic welfare of the trading community is clearly adverse. The system of voluntary restraint agreements that has protected the U.S. steel industry in recent years is an excellent example of a safeguards action in which the sole form of "compensation" was the transfer of quota rents to foreign steel producers. Likewise, many "gray area" quantitative restrictions outside the formal ambit of Article XIX may be viewed as *de facto* safeguards measures in which compensation takes the form of quota rents.

The discussion to follow thus assumes that politically acceptable, incremental reform of Article XIX will not jeopardize future trade negotiations to such an extent that reform becomes counterproductive, and that additional constraints on the use of safeguards measures will tend to reduce the overall level of protection and enhance the economic welfare of the trading community. The objective is to identify a course of reform that allows safeguards actions often when the political stakes are high in the importing country, yet confines them to circumstances in which protection advances plausible, legitimate domestic goals, and imposes comparatively modest burdens on other members of the trading community.

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[17] See Sykes, "Protectionism as a 'Safeguard'."

Safeguards Measures and Labor Market Dislocation

Although protectionist measures are difficult to justify as a "first-best" policy under any circumstances, not all such measures are equally detrimental.[18] In some cases, protection for "injured" industries can advance plausible, high-minded policy objectives relating to problems of severe labor market dislocation. It is less damaging to the importing country in such cases, and with proper constraints the damage to the trading community as a whole can be held within reasonable bounds.

Consideration of the Importing Country

From an efficiency perspective, temporary protection to ameliorate severe labor market dislocation in an import-competing industry can reduce underlying distortions in the labor market. From a distributional perspective, it can provide assistance to individuals who, through no fault of their own, have lost the opportunity to earn a reasonable return on their investments in specific human capital.

Efficiency

The classical case for free trade rests on the competitive model, which embodies stringent assumptions about input markets generally and labor markets in particular. Specifically, the model assumes that wages adjust instantaneously to clear labor markets, and that marginal workers earn a return just equal to what they can command in their next-best employment opportunity. In effect, *marginal* workers are indifferent between their current jobs and their best alternative, and the marginal cost of labor to domestic producers is equal to its social opportunity cost. Involuntary unemployment, *a fortiori*, does not exist, and workers who move from higher paying jobs to lower paying jobs do so only when the added psychic compensation fully offsets the reduction in wages.

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[18] The "optimal tariff" literature also has much to say about this matter, as does the modern strategic trade policy literature.

For a variety of reasons, however, marginal workers may earn a premium over what they can earn elsewhere — in economic parlance, a "rent."[19] Unionization and minimum wages are two are sources of such rents. Excessive investment in job search because of overoptimistic information about job opportunities elsewhere — most likely during a cyclical downturn — is a further source of marginal "rents."[20] Marginal rents can also result from the subsidization of leisure by a government transfer payments system.[21] Indeed, as suggested above, truly involuntary unemployment necessarily reflects the presence of rents to marginal workers, whether it is an equilibrium or disequilibrium phenomenon.[22]

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[19] For a more complete exposition, see Alan O. Sykes, "Countervailing Duty Law: An Economic Perspective," *Columbia Law Review* 89 (1989).

[20] See, for example, Armen Alchian, "Information Costs, Pricing, and Resource Unemployment," in E. Phelps, ed., *Microeconomic Foundations of Employment and Inflation Theory* (New York: W.W. Norton, 1970), p. 27.

[21] Transfer programs and unemployment insurance have sometimes been advanced as at least a partial explanation for a downward "stickiness" of real wages — an apparent tendency for real wages to remain stable in the face of slackening labor demand — that causes unemployment to rise more than might be expected in an otherwise competitive labor market. See Martin Baily, "Wages and Employment Under Uncertain Demand," *Review of Economic Studies* 41 (1974); Robert Gordon, "The Theory of Domestic Inflation," *American Economic Review* 67 (Papers and Proceedings, 1977); and idem, "Recent Developments in the Theory of Inflation and Unemployment," *Journal of Monetary Economics* 2 (1976).

To be sure, other factors of production earn rents. Rents accrue to any fixed factor such as land, and the return on investment to any industry-specific capital asset is often termed a "quasi-rent." But there is little theoretical reason to believe that such rents will not usually decline in the face of falling resource demand to keep the resource employed in its most-valued use. That is, there is little theoretical reason to believe that such rents arise at the margin; rather, such rents will almost always be inframarginal, and will not reflect any inefficiency in the behavior of the market.

By contrast, rents at the margin in the labor market, arising for any one of the reasons noted above, lead to an equilibrium — or perhaps reflect a disequilibrium — in which wages are inefficiently high, and employment is inefficiently low.[23] Trade policy is undoubtedly not the first-best policy instrument to correct this inefficiency. Nevertheless, protective measures will stimulate the demand for domestic goods, and thus stimulate employment. Hence, protection can generate an efficiency gain at the margin in the labor market. Even though this gain is offset by losses on other margins, protection seems less damaging, other things being equal, when it has a favorable impact on the labor market.

Two important caveats arise. First, protection will shift the terms of trade; by reducing the demand for foreign currencies to buy imports, protection will cause the home market currency to appreciate. As a result, overseas demand for domestic exports will decline. If rents at the margin in exporting industries are as large as in the protected importing industry, nothing will have been gained.[24] This observation highlights the importance of restricting protection to industries where rents at the margin are atypically high in relation to the economy as a whole.

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[22] On the debate over the existence and causes of involuntary unemployment, see the sources cited in note 21 above, and Robert Lucas and Leonard Rapping, "Real Wages, Employment and Inflation," in Phelps, ed., *Microeconomic Foundations of Employment and Inflation Theory*, p. 257; and Sherwin Rosen, "Implicit Contracts: A Survey," *Journal of Economic Literature* 23 (1985).

[23] The caveat is suggested by recent work on "efficiency wage" theory, which posits that involuntary unemployment is an efficient adaptation to agency costs. A useful collection of essays is G. Akerlof and J. Yellen, *Efficiency Wage Models of the Labor Market* (New York: Cambridge University Press, 1986).

Second, the purported efficiency gain at the margin in the labor market can evaporate if protection *causes* rents at the margin to increase. This concern is primarily important when rents at the margin are attributable to unionization. If unions know that they are more likely to obtain protection when rents at the margin are high — that is, when they resist wage concessions in favor of unemployment for union members — then a policy of protecting unionized industries may be counterproductive.

Subject to these caveats, the greater the initial distortion in the labor market — that is, the higher the rents at the margin — the greater the gains from protection in the labor market. When an industry is contracting, two rough indicators of high rents at the margin are (i) high levels of sustained unemployment among workers who lose their jobs in an industry, and (ii) substantial "underemployment," whereby displaced workers accept alternative positions for substantially lower compensation than workers with comparable skills who remain employed in the industry.[25]

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[24] As a first approximation, one would expect any decline in the value of imports to be offset by an equal decline in exports.

[25] To be sure, these indicators may be misleading. "Unemployment," for example, may reflect simply an efficient investment in search for attractive alternatives. But the presence of unusually high and sustained unemployment or underemployment provides some support for an inference that significant rents to marginal workers are present. If the contraction of an industry is not accompanied by substantial unemployment or underemployment, the hypothesis that rents to marginal workers are sizable may be rejected.

The analysis is ultimately more complex, however, because safeguards measures are temporary. The argument for limiting such measures to cases of labor market dislocation has little force if temporary protection merely postpones dislocation to a future period, although it would still reduce the "present value" of the attendant efficiency losses. Thus, the argument is most convincing for cases in which rents at the margin arise or increase because of transitory conditions. Put simply, unemployment and underemployment must result from some shock to the labor market that creates temporary distortion.

To this point, however, the analysis provides little basis for distinguishing among these shocks or for limiting temporary protection to cases in which "increased quantities" of imports are the cause of dislocation.[26] Indeed, if the decline in the demand for labor is due solely to a *permanent* increase in import competition, then temporary protection has considerably less appeal because it simply defers the costs of labor market dislocation to a future period. Consideration of the effects of protection on the welfare of *exporting* countries, however, will suggest a possible rationale for a requirement that protection be limited to circumstances in which import competition is increasing. Prior to that discussion, however, a further conceivable benefit of safeguards measures from the importing country's perspective warrants consideration.

Distribution

Even though a reduction in the price of imports almost invariably enhances national economic welfare as measured by aggregate consumer and producer surplus, import-competing firms and workers employed in those firms will suffer a loss of wealth. The question thus arises whether trade policy, and safeguards measures in particular, might promote reasonable redistributive goals.[27]

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[26] If the shock is an economy-wide recession, however, any gains in the protected industry will likely be lost in export industries because of the terms of trade shift.

Arguably, the hardship that results from import competition is no different in character from the hardship that can result from domestic competition or from the business cycle; the burdens of unemployment and economic dislocation are much the same whatever the cause. Hence, individuals who suffer financial reversals as a result of import competition perhaps should not enjoy special entitlement to assistance, but only the protection of whatever public safety net programs the government makes available.

The counterargument is that workers who are displaced by import competition may suffer a greater loss of wealth than other displaced workers if their skills are not readily transferable to other industries. When domestic firms fail as a result of domestic competition, for example, the demise of one domestic firm is typically accompanied by the expansion or creation of another domestic firm in the same line of business. Displaced workers *may* then have an opportunity to secure alternative employment that draws upon their existing skills and training, perhaps even in the same geographic area. The same cannot be said of workers displaced by import competition, as relocation to find employment overseas is rarely an attractive option. Likewise, when workers are displaced by cyclical downturns in the domestic economy, they may at least anticipate that the displacement is temporary and that they will eventually be able to return to work in a position that draws on their existing human capital. Workers displaced by import competition, by contrast, sometimes have little hope of returning to work in the same industry, and are then confronted with a choice of retraining themselves for a new line of work or accepting employment in unskilled positions.

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[27] John Jackson has argued that the function of safeguards measures is to provide some compensation to those citizens who are harmed by trade liberalization — in other words, the removal of trade barriers by the government would be analogous to a "taking" by eminent domain. See John H. Jackson, *World Trade and the Law of GATT* (Indianapolis: Bobbs-Merrill, 1969), pp. 567–573; and J. Jackson and W. Davey, *International Economic Relations*, 2nd ed. (St. Paul, Minn.: West Publishing, 1986), pp. 540–541.

These observations perhaps justify programs of special assistance for workers who are displaced by import competition and whose skills are not readily transferable to other industries.[28] The more difficult question is whether trade restrictions are ever the best way to deliver such assistance. Economists routinely — and no doubt rightly — suggest that protection is an inferior policy instrument for the delivery of aid to "needy" individuals, whatever the criterion of "need".[29] Nevertheless, even if temporary protection is inferior to other policy instruments, it can still considerably reduce the burden of adjustment for workers who must find alternative employment. Properly applied, it can delay the contraction of an industry while workers conduct their job search, so that workers can in many cases avoid the considerable financial and psychic costs of extended unemployment. Once again, therefore, an argument can be made that protection in cases of severe labor market dislocation is less objectionable than otherwise.

Might the same argument be made where the loss of wealth is suffered by owners of specific capital assets? If the firm is a small business, such as a sole proprietorship, the owner may become unemployed much like the employees, or be forced to accept a dramatically lower income stream in an alternative line of business. If land is the "capital" at issue, and its owner is a small farmer, the decline in its value is much like the loss of return to specific human capital (but of course land is usually not a "specific" asset since it can be used to produce a variety of crops). The case for assistance to these individuals is thus in some cases much the same as the case for assistance to workers who are discharged by their employers.

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[28] A possible counterargument is that "workers whose skills are not readily transferable" are by definition skilled workers; unskilled workers can find employment in a variety of industries. Because skilled workers tend to earn more than unskilled workers, public aid to skilled workers tends to benefit individuals who are considerably wealthier than the neediest members of society.

[29] See, for example, Lawrence and Litan, *Saving Free Trade*, pp. 12–33; and Jagdish Bhagwati and T.N. Srinivasan, *Lectures on International Trade* (Cambridge, Mass.: MIT Press, 1983), pp. 212–224. For an interesting formal treatment of some of the tensions between efficiency and distributional objectives in trade policy, and how best to resolve them, see Peter Diamond, "Protection, Trade Adjustment Assistance, and Income Distribution," in Jagdish Bhagwati, ed., *Import Competition and Response* (Chicago: University of Chicago Press, 1982), p. 123. See also Steven Shavell, "A Note on Efficiency vs. Distributional Equity in Legal Rulemaking: Should Distributional Equity Matter Given Optimal Income Taxation?" *American Economic Review* 71 (Papers and Proceedings 1981).

For larger, publicly held companies, by contrast, the case for assistance to the firm's owners seems exceedingly weak. Stockholders in large companies are often institutional investors rather than individuals, and the individual investors are often quite wealthy. Further, investors ordinarily hold diversified portfolios, so that the impact of declining profitability in a single industry upon their wealth is typically modest. Finally, investment capital is decidedly more mobile than workers. If investment conditions turn sour in the domestic industry, the opportunity to invest abroad will often be present. Hence, if protection is to promote equity in the wealth distribution, the fact that import competition causes a loss of profits in the import-competing industry often has little relevance.

Instead, the value, if any, of protection as a redistributive tool arises when individuals who are not in a position to diversify have lost a large percentage of their wealth because of a sizable and lasting decline in the value of an industry-specific asset. Most commonly, this phenomenon arises because workers in a declining industry have great difficulty finding alternative employment at comparable wages because their existing job skills do not transfer readily to other positions. It may also arise, as noted, when the owner of a small business or farm loses the anticipated return to an industry-specific capital asset. All of these examples fall within the broad concept of "labor market dislocation" because they reflect the inability of *individuals*, whether employees or small business proprietors, to maintain their livelihood in the face of declining demand in the output market.

Interestingly, therefore, the gross indicators of conditions under which temporary protection may advance redistributive goals — evidence of sustained unemployment or underemployment among workers or small business proprietors — correspond roughly to the indicators of conditions where temporary protection may ameliorate labor market inefficiencies. An important distinction is to be drawn, however, between the earlier efficiency discussion and the distribution discussion. Recall that temporary protection does little to ameliorate the inefficiencies that arise when marginal workers earn rents if it simply defers those inefficiencies to a future period. By contrast, the redistributive rationale posits that workers must adjust to a long-term decline in the demand for their services. If the decline in demand is merely transitory, the burden of adjustment is no greater as a first approximation than in the case of an ordinary recession, and the earlier argument for special assistance to individuals who are displaced by import competition does not apply.

Further, the caveat developed in the course of the efficiency discussion applies here as well. A terms-of-trade shift attributable to protection will cause dislocation in export industries. Thus, the argument that temporary protection may affect the wealth distribution favorably is most persuasive — if it is persuasive at all — when protection is applied to benefit workers who are particularly needy relative to unemployed workers in general, because the protected workers are highly immobile.

Consideration of Exporting Countries

Safeguards measures inevitably impose costs on exporting nations. On the assumption that some form of escape clause is politically necessary to the GATT, it is in the interest of the GATT community to limit "escape" to circumstances in which its costs to signatories in the aggregate are modest rather than large, other things being equal.

A number of factors affect the magnitude of the costs that safeguards actions impose on exporting nations. In the competitive case, the loss of producer surplus in exporting nations increases, other things being equal, as the output supply curve in those nations becomes less elastic. In the limiting case of a perfectly elastic supply curve, safeguards measures do no harm at all to exporting nations because resources can be reallocated to equally valuable alternative uses. Likewise, the welfare loss becomes smaller as consumer demand in markets outside country *X* becomes more elastic. When consumer demand is highly elastic overseas, foreign markets can absorb an increase in shipments without a significant decline in the price received by foreign producers.

Moving away from the competitive case, suppose that labor markets in exporting countries exhibit imperfections that allow marginal workers to earn rents. In that event, the effect of trade restrictions on exporting nations is less favorable. Generally, the greater the extent to which the restrictions cause serious unemployment or underemployment in those nations, the greater the cost of trade restrictions to those nations. This relationship forms a corollary of the earlier proposition that serious unemployment and underemployment are rough indicators of the presence of rents to marginal workers.

Further, just as trade restrictions may enhance the perceived equity of the wealth distribution in the importing nation, so may they adversely affect the perceived equity of the wealth distribution abroad. Once again, as a very rough generalization, the greater the extent to which trade restrictions result in a significant decline in the prices received by foreign producers, and the greater the extent to which they cause significant unemployment and underemployment among workers or small business proprietors, then the greater the likelihood of adverse effects abroad.

But it is difficult to imagine how systematic attention to these considerations could be required under Article XIX. The GATT has no central authority with the capacity to oversee the administration of the injury test. Rather, the injury determination is made by the importing nation, and authorities in the importing nation are unlikely to possess the necessary information to assess the impact of trade restrictions abroad. Consequently, a careful and explicit "balancing" of the interests of exporting nations against those of the importing nation simply does not appear feasible without radical change in the institutional structure of the GATT.

However, the causation component of the injury test may provide an imperfect surrogate for this balancing of interests, because the consequences of temporary protection for exporting countries may vary considerably with the cause of industrial difficulties in the importing country. In particular, a proper causation test might endeavor to limit safeguards actions to cases where their net effect on *worldwide* labor market dislocation is relatively more favorable.

Consider, for example, a safeguards action to address the dislocation caused by a recession in the importing country. Fluctuations in the business cycle may affect many nations simultaneously,[30] and even though the importing nation and its trading partners would not otherwise suffer cyclical downturns at the same time, the systematic imposition of trade restrictions following a cyclical downturn in one country can surely contribute to recessionary conditions elsewhere. Thus, in many cases, trade restrictions to ameliorate the labor market dislocation caused by a cyclical downturn may simply shift unemployment and underemployment from one country to another, and do little to ameliorate the perceived costs of worldwide labor market dislocation. Indeed, if safeguards measures are permitted when the cause of dislocation is domestic recession, the result may be an upward spiral in the level of protection as the initial protective measures provoke protective measures abroad in response, exacerbating recessionary conditions around the world.

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[30] Indeed, much of the impetus for the GATT stemmed from the global recession of the 1930s.

Consider, alternatively, the use of safeguards measures following a loss of competitive advantage in the importing country because of developments abroad, such as the discovery of new natural resources by a trading partner. Production and exports in the country with the newly discovered resources will expand more than production contracts in other countries because prices will fall and worldwide consumption will rise. Temporary restrictions on exports from the country with newly discovered resources can then avert labor market dislocation in the importing country without causing contraction in the exporting industry, and thus in many cases without causing much labor market dislocation.[31] Even where restrictions do cause a contraction in the exporting industry, the danger of serious dislocation in the exporting country is perhaps smaller if the exporting industry is profitable and is expanding its sales at home and in third-country markets.

As a third possibility, consider the use of safeguards measures in response to the labor market dislocation that attends an increase in domestic costs of production — for example, a depletion of natural resources in the importing country. This scenario presents an intermediate case because the increase in domestic production cost will enhance the competitive position of foreign suppliers and enable them to expand their exports; yet not so much as if their own production cost had fallen, thereby allowing them to lower their prices and attract new consumers into the market. A given protective measure here is more likely to cause significant dislocation in the exporting country than in cases where production costs in that country are falling, but less likely to cause significant dislocation than in cases where the cause of dislocation in the importing country is domestic recession.

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[31] Of course, if labor market dislocation is present in an exporting country for other reasons, such as recession, expansion of an exporting industry may help to alleviate it.

This discussion suggests a plausible basis for a decision to condition the legality of safeguards measures upon the causes of labor market dislocation in the importing country. More precisely, it suggests that safeguards measures are least desirable when their effect is simply to shift the consequences of domestic recession from domestic to foreign producers. They are somewhat less harmful when they protect producers in the importing country from developments that increase their production cost. Finally, safeguards measures are least harmful when they respond to developments abroad that lower the production cost of foreign producers. They are also relatively less harmful when unexpected labor market dislocation attends a trade concession by the importing country. A reduction in the level of protection is analogous to a reduction in the production cost abroad, because foreign exports will expand by more than domestic production contracts since the fall in consumer prices stimulates consumption.

By this reasoning, the best case for safeguards action on efficiency grounds might be made, for example, where a transitory decline in the demand for labor in the importing country — producing temporary high unemployment and underemployment — results from a lag between the adoption of more efficient technology abroad and its adoption at home. Likewise, the best case for safeguards action on redistributive grounds might be made where a long-term contraction of the domestic industry is caused by a permanent reduction in tariffs or other protective measures, or a permanent decline in overseas production costs.

Implications

An emphasis on labor market dislocation under the injury test would require a considerable departure from current GATT practice to restrict the permissible indicators of injury. In particular, there would be two principal indicators of injury: sustained unemployment and underemployment.[32] Unemployment and underemployment are no doubt correlated with the other indicators of injury under current practice — declining prices, profits, output, and so forth — but the correlation is imperfect, since these measures may reflect industrial decline whether or not marginal workers earn significant rents, and whether or not the skills of discharged workers transfer readily to other industries.

A concern for the likely effect of safeguards measures upon labor market dislocation in exporting nations also suggests the desirability of further constraints on the analysis of "causation" under Article XIX. In particular, it favors an approach to causal analysis akin — though certainly not identical — to that now favored by a minority of commissioners on the U.S. International Trade Commission, who posit that shifts in domestic demand, domestic supply, and import supply are the three candidate causes of injury. As noted, the consequences of safeguards measures tend to be least unfavorable when they attend a decline in production costs in exporting nations or a trade concession, and a downward shift of the import supply curve often reflects precisely such developments. Such a shift, however, may also reflect other developments; a recession abroad, for example, will lead to a fall in prices abroad and thus to a reduction in the price that exporters demand for their products.[33] Thus, the existence of a causal relation between injury and a downward shift of the import supply curve is a useful though imperfect indicator of conditions under which safeguards measures tend to have less unfavorable consequences for the international community as a whole. An agreement among GATT signatories to require such a causal relation as a precondition to safeguards action, therefore, might well represent an improvement over current practice. An alternative and likely superior reform would be simply to require a causal relation between injury or threat and (i) events that reduce costs of production for foreign suppliers, or (ii) reductions in the level of protection because of trade concessions.

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[32] Evidence of rents at the margin would exist only if the workers who leave the industry earn substantially less on leaving than workers who remain employed in the industry.

Conclusion: Politics Revisited

The analysis to this point provides an argument, however tentative, for a reorientation of the injury test under Article XIX. It suggests that the inquiry should focus on labor market dislocation: on its severity in the importing country as an indicator of "serious injury," and on the likely effect of safeguards measures on labor market dislocation in exporting nations through the analysis of causation. Before concluding, it is important to inquire whether these reforms would undermine what Kenneth Dam and I view as the true economic justification for Article IX: the facilitation of trade agreements among self-interested political officials.

As noted earlier, Article XIX provides a safety valve that, *ex ante*, reduces the political riskiness of trade liberalization. Any reform that precludes the use of safeguards measures when the political stakes are especially high for officials in the importing country runs the risk of discouraging concessions in the first instance. Yet, because any reform must ultimately be acceptable to the same political officials with an interest in maintaining a viable escape clause, there is probably little danger that reforms will be adopted that will later prove counterproductive. Rather, the greater danger is that useful reforms will prove politically unacceptable and never be enacted. Thus, what remains is to inquire whether the reorientation of the injury test proposed here would so restrict the scope of safeguards actions that political officials will find the proposal altogether unacceptable.

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[33] An appreciation in the value of the importing country's currency may also be depicted as a downward shift in the import supply curve. Exchange fluctuations shift either the import supply curve or the domestic supply and demand curves, depending upon whether "price" is in units of domestic or foreign currency. Protective measures in response to exchange fluctuations are perhaps less desirable than in cases involving declining production costs abroad or trade concessions because currency revaluations, as a first approximation, seem unlikely to have much effect one way or the other on worldwide consumption.

Arguably, cases of severe labor market dislocation create the most intense pressure for protection. When many voters are out of work and others are threatened with unemployment, the political rewards of protection are great if it is perceived that such action will significantly improve the situation. Further, protective measures are perhaps more acceptable to the electorate when they believe their purpose is to put people back to work in a depressed industry. Thus, a limitation of safeguards actions to cases of serious labor market dislocation, including dislocated small business proprietors within the concept of "labor," would preserve the safeguards option for many if not most of the cases of greatest political importance.

Efforts to reform the causation component of the injury test might prove more problematic politically. Not surprisingly, the proponents of protectionism in times of economic hardship rarely pay heed to the cause of that hardship. In the United States, for example, the ability to invoke the escape clause when domestic recession is the principal cause of industrial downturn has been carefully preserved by statute.[34] Yet, the political costs and benefits of the causation requirement are reciprocal. If safeguards measures are used under circumstances where they simply shift labor market dislocation from country to country, all trading nations are at risk. The consequent detriment to their exporting sectors, and the possibility of spiraling protection around the globe during generalized economic downturns, surely creates economic risks that may translate into political risks. Perhaps this observation will suffice to persuade the GATT community to accept meaningful constraints on the causal prerequisites for safeguards action.

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[34] See 19 U.S.C. Section 2252(c) (2)(A).

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A Comment

Robert Z. Lawrence

Alan Sykes seeks to modify the injury test for escape clause actions in two respects. He would confine the definition of serious *injury* required for escape clause relief to serious *labor market* dislocation. Currently, injury has a much broader interpretation that includes all producers — that is, firms. He would also try to increase assurances that safeguards are not employed when dislocation results *principally* from recession or increases in production costs in the importing nation.

While I enjoyed the rigor and clarity with which Sykes presents his arguments, I have some disagreements with his reasoning and conclusions, and these differences will serve as the focus of my comments.

First, as a general comment, both of Sykes' suggestions go in the direction of tightening eligibility for the escape clause. This raises the question of the current historical context in which this discussion takes place — a question not dealt with in the paper. Is the escape clause being abused or is it being neglected? If it has indeed become a major source of protectionism, presumably these tightening modifications are called for. But the record actually shows, as Sykes himself points out, that the escape clause has been used infrequently. In the United States, moreover, the escape clause has operated reasonably well. In particular, protection has been temporary and adjustment has been reasonable. Moreover, the results have been much less satisfactory where protection has been granted through the alternative mechanisms of antidumping procedures and voluntary restraint arrangements (VRAs).

The escape clause was, of course, one of the unfinished items on the negotiating agenda. Indeed, its reform has been on the agenda for 17 years. It seems clear that the resistance comes from those who find it too stringent, rather than too lenient. Therefore, regardless of the analytical merits of Sykes' arguments, politically it is a move in the wrong direction viewed from both the United States' and the systemic perspective. Sykes has aimed all this intellectual firepower in the wrong direction. Currently, the actual debate is between those who believe Article XIX should be modified in a more lenient direction to ensure countries conform, and those who believe it should be radically changed to incorporate and legitimate current gray area practices and bilateral discrimination.

My own view supports the former position. I think we should move to make the escape clause route more attractive relative to the alternatives. This could be done by making it more difficult to get VRA protection — for example, by removing the antitrust immunity because of sovereign compulsion — and by tightening the rules on dumping. However, in addition, I would also make some forms of relief under the escape clause easier to obtain and would weaken the provision for compensation under certain circumstances.

Now let me turn to some of Sykes' specific arguments, beginning with the economic justification for the escape clause. Since protection is never a first-best response to problems of efficiency and distribution, Sykes argues the escape clause has a second-best justification: that it facilitates concessions in trade negotiations. Trade negotiators will be more inclined to make concessions when they have some assurance that if these concessions become more costly than expected in the future, then they can be retracted. If this is the purpose, as Sykes points out, making the safeguards clause tougher could impact on future concessions. Sykes then states that, for the rest of the discussion, he will ignore the interaction between the escape clause and future concessions.

But while he is to be commended for making this assumption explicit, we should ask whether or not it is an appropriate assumption. The tougher the escape clause, the less the likelihood of future concessions. In addition, it is more likely that countries will ignore the escape clause route, and operate through other forms of protection such as VRAs. These trade-offs are critical to the debate about safeguard reform, but Sykes is assuming them away.

Let me point out something that might justify his practice, but that he ignores: Article XIX of the GATT provides that foreign suppliers may retaliate or be compensated for losses resulting from restricted market access. In terms of a logic that is bizarre to economists — why would a country seek to hurt itself and retaliate with more protection? — but that makes sense in the GATT context in which less protection is a concession, even if the importer invokes the escape clause, in principle the exporter receives something of equal value.

Two arguments lead Sykes to advocate using only injury to labor rather than other factors of production. First, on efficiency grounds, the labor market may result in rents. Therefore, as a second-best policy, a country could be better off with protection. But in practice it is difficult to isolate the returns to labor that are rents, from those that reflect more general human capital, and the argument about rents surely applies to factors such as land and specific capital.

A second argument is distribution. This raises the question about why those who are displaced due to trade should be given different treatment on equity grounds. Why is trade displacement different? Sykes argues that it is because the jobs are not available in the same industry. But, of course, domestic productivity improvements also displace workers without immediately making jobs available elsewhere; and in any case, even if jobs are available in the same industry with domestic displacement, in large countries such as the United States and

Canada, these may only be available in other parts of the country.

I think, in fact, that trade is different because of simple political reasons. Foreigners do not vote; accordingly, they do not appear with the same weight in the national utility function. Governments find it hard to choose between the jobs of their own citizens. They are more willing to prefer jobs for their own citizens over jobs for foreigners. Given the greater ability of workers to prevent changes resulting from trade, they have a stronger claim for compensation.

Sykes also considers the situation in the exporting countries. He argues they will typically be in a better position to withstand foreign protection when they experience an outward shift in their supply curves. But here, he ignores two key features. The first is the issue of compensation. As noted above, countries are entitled to compensation either through an offsetting reduction in other tariffs by the importing country or by raising protection of their own. Yet Sykes does not deal with this. He also overlooks the possibility of an export surge, resulting not from an outward shift in the foreign supply curve, but from an inward shift in the foreign demand curve. In such a case, increased exports could be associated with higher foreign unemployment and his reasoning would not apply; foreigners would be in a poor situation to withstand protection.

Throwing Deep: Trade Remedy Laws in a First-Best World

Michael J. Trebilcock[*]

Introduction: The Problem of Substitutability

As is now widely appreciated, the most significant failure of the negotiations that culminated in the Canada-U.S. Free Trade Agreement was the inability of the two countries to agree on new substantive regimes governing contingent protection measures. With the exception of the provisions of Chapter 11, which deal with emergency (safeguard) actions, and the provisions of Chapter 19, which create a provisional dispute settlement process to ensure the fair application of antidumping and countervailing duty laws by domestic tribunals, the Agreement merely contemplates further negotiations over the next five to seven years to seek substitute regulations for antidumping and countervailing duties as applied to bilateral trade.

These same issues continue to prove highly problematic in multilateral negotiations. While an Antidumping Code was negotiated during the Kennedy Round and revised during the Tokyo Round of negotiations under the General Agreement on Tariffs and Trade (GATT), the Subsidies Code negotiated during the Tokyo Round is extraordinarily vague on key issues and of limited efficacy, while negotiations during and after the Tokyo Round over a new safeguards regime proved totally abortive.

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[*] I am indebted to Gary Horlick for insightful comments on an earlier draft, and to Robert Howse for invaluable research assistance.

In contemplating the reform of contingent protection measures — trade remedy laws — four preliminary points need to be kept in mind. First and foremost, it is impossible to address one form of contingent protection measure without simultaneously addressing all the others because of their close substitutability. In other words, antidumping laws, countervailing duty laws, safeguard regimes, and bilateral quantitative restrictions — voluntary export restraints, orderly marketing agreements — address similar phenomena and concerns; reforming one without reforming the others will simply lead to substitutions among the regimes. The appended tables indicate that the European Community (EC) invokes antidumping laws in a large number of cases against external trading powers, but rarely invokes countervailing duties; but among members of the EC, neither antidumping laws nor countervailing duty laws exist, although other institutional mechanisms have been created to deal with internal "unfair trade" issues. The New Zealand and Australia Closer Economic Relations Agreement also has recently led to the abolition of antidumping duties in intercountry trade but also provides other institutional mechanisms for resolving "unfair trade" disputes. The United States invokes both countervailing duties and antidumping duties in a large number of cases. Canada invokes antidumping duties in a significant number of cases but rarely countervailing duties. Australia has frequently used safeguard actions — as well as antidumping actions — while other countries, preferring to resort to bilateral quantitative restrictions, use safeguard actions less frequently.

Second, domestic adjustment assistance policies are a substitute for any form of trade restriction in dealing with adjustment costs, and typically entail fewer social costs. Thus, reconceiving the role of these policies is central to the reform of trade remedy laws.

Third, to consider reform of trade remedy laws only in a bilateral context, is likely to be unproductive without simultaneous multilateral consideration. It is difficult to imagine that either the United States or Canada will make major concessions in terms of circumscribing the scope of their domestic trade remedy laws or domestic subsidy policies without being sensitive to the multilateral generality of these reforms. The outcomes of these current multilateral negotiations will likely form the basis of subsequent bilateral negotiations.

Fourth, an academic perspective on the reform of trade remedy laws must emphasize first principles — as with the virtues of trade liberalization itself — rather than attempt to engage in practical politics where others enjoy a comparative advantage, on the assumption that good ideas will eventually drive out the bad, or at least more narrowly contain the latter.

In defining the role of the scholar in debates over trade remedy reform, the following story, related by Judge Alvin Rubin of the United States Court of Appeals for the Fifth Circuit, provides instructive guidance. During an interview with Kenny "The Snake" Stabler, former NFL quarterback for the Oakland Raiders and New Orleans Saints, the interviewer read the following quote of novelist Jack London: "I would rather be ashes than dust. I would rather that my spark burn out in a brilliant blaze than that I should be stifled by dry rot. I would rather be a superb meteor than a sleepy permanent planet." Then he asked, "What message do you think London was trying to convey?" "Throw deep," said Stabler.[1]

"Throwing deep," from an academic perspective on trade remedy and adjustment assistance reform, leads me to assert the following four propositions, which I will attempt to develop and defend in this paper:

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[1] Cited by Alvin B. Rubin, "Does Law Matter? A Judge's Response to the Critical Legal Studies Movement," *Journal of Legal Education* 37 (1987): 307.

- there is no intellectual case for antidumping laws;
- there is no intellectual case for countervailing duty laws;
- there is an intellectually defensible case in a narrow range of situations for a well-structured safeguards regime, but primarily on noneconomic grounds relating to the distributional and community impacts of adjustment costs;
- in most cases, domestic adjustment costs can be more appropriately dealt with by domestic adjustment assistance policies rather than by any form of trade restrictions.

Let me address each of these four propositions.

Antidumping

While domestic antidumping laws have a history dating back to the turn of the century,[2] and were legitimated internationally by Article VI of the GATT in 1947, an economic rationale for their existence has, for the most part, proved elusive.[3] Antidumping laws permit countries to impose duties equaling the difference between a foreign exporter's home market prices and its lower prices charged in importing country markets. The primary economic rationale that would seem to justify such laws is predatory pricing.[4] However, as with predation under domestic antitrust laws, the assumptions that a successful strategy of predation must meet are severe, suggesting that such cases will be rare.[5] Moreover, any economic analysis of alleged predation will focus on the relationship between an alleged predator's prices and costs — defining the measure of cost is admittedly contentious — to determine if the predator is selling below cost with the expectation of recovering losses from supracompetitive prices once its rivals have been driven from the market.

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[2] See John J. Barcelo, "Antidumping Laws as Barriers to Trade: The U.S. and the International Antidumping Code," *Cornell Law Review* 57 (1971-72).

[3] See ibid.; Michael Trebilcock and John Quinn, "The Canadian Antidumping Act," *Canada-U.S. Law Journal* 2 (1979); and Alan Deardorff, "An Economic Perspective on Dumping Law," in John H. Jackson and Edwin A. Vermulst, eds., *Antidumping Law and Practice: A Comparative Study* (Ann Arbor: University of Michigan Press, 1989).

[4] A secondary economic justification may be to avoid wasteful exit and re-entry costs for domestic producers in cases of intermittent dumping. See Barcelo, "Antidumping Laws as Barriers to Trade"; Trebilcock and Quinn, "The Canadian Antidumping Act"; Deardorff, "An Economic Perspective on Dumping Law"; and Jacob Viner, *Dumping: A Problem in International Trade* (New York: A.M. Kelly, 1966).

In contrast, in antidumping cases, the primary focus of inquiry has historically been on the divergence between a foreign firm's prices in its home market and lower prices it may be charging in its export markets. Such a divergence may reflect international price discrimination between the two markets, reflecting, in turn, market power that the exporter possesses in its home market that it does not possess in its export market. But this is scarcely a reason why a government in the export market should wish, out of a perverse sense of egalitarianism, to see its own consumers charged monopoly prices in order to replicate consumer misery in the home market.[6] Again, as with predation, the current antitrust learning on price discrimination[7] needs to be brought to bear on international manifestations of the same phenomena.

U.S. antidumping case law, for example, increasingly tends to compare export market prices with the fully allocated costs, including research and development, of the exporter in a given year — a test substantially different from cost concepts applied in domestic predation cases, that few domestic companies can pass. Moreover, injury is determined abstracting from causation, simply by investigating whether a domestic industry's performance has deteriorated in recent years. Given a prior determination of "dumping", and given that all imports, "dumped" or not, are likely to reduce the domestic producers' market share, causation is largely assumed and duties are imposed in the amount of the price differential.[8]

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[5] Bruce Dunlop, David McQueen, and Michael Trebilcock, *Canadian Competition Policy* (Toronto: Canada Law Book, 1987), chap. 8.

[6] Trebilcock and Quinn, "The Canadian Antidumping Act."

[7] See Dunlop, McQueen, and Trebilcock, *Canadian Competition Policy*, chap. 8.

Very few antidumping cases plausibly fall within the range of a legitimate predation concern. Those that do can be adequately dealt with under domestic antitrust laws on predation, which further bilateral and multilateral negotiations could usefully seek to harmonize.

While efficiency arguments for antidumping laws are tenuous at best, it may well be the case that equity concerns over the distributive or community impacts of disruptive, low-priced imports provide a firmer footing for intervention. But this concern, I argue, is more properly the domain of domestic adjustment assistance policies or, at the limit, a well-conceived safeguards regime. A study, undertaken by Susan Hutton and the author, of all affirmative injury determinations in 30 Canadian antidumping cases between October 30, 1984, and February 3, 1989, shows that almost two-thirds of the cases lacked any plausible normative justification for intervention at all (see Table 1). In the remaining third of the cases, other policy instruments would have been more appropriately responsive to the normative concerns present.

Countervailing Duties

Countervailing duties may be imposed under domestic law with the sanction of Article VI of the GATT, concerning cases where subsidized imports are causing material injury to a domestic industry producing a like or directly competitive product. In recent literature on subsidies in international trade, it has become fashionable to talk of the need to develop a three-way

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[8] See Ronald Cass, "Economics in the Administration of U.S. International Trade Law," University of Toronto, International Business and Trade Law Programme Working Paper (Toronto: University of Toronto, May 31, 1989).

Table 1

Canadian Antidumping Cases, 1984–89

Cause of injury determination	**Number of cases out of total**
Predation	0 out of 30 cases
Intermittent dumping	4 out of 30 cases[a]
Distributive justice, combined with communitarianism	4 out of 30 cases[a]
Distributive justice alone	2 out of 30 cases[b]
Communitarianism alone	5 out of 30 cases
Normative justifications for intervention present	11 out of 30 cases
Optimal choice of policy instrument	0 out of 30 cases

[a] Same agricultural cases.

[b] Excludes two marginal cases.

Source: Susan Hutton and Michael Trebilcock, "An Empirical Study of the Application of Canadian Anti-dumping Laws: A Search for Normative Rationales," *Journal of World Trade* 24 (1990): 123.

taxonomy of subsidies — black (red), gray (yellow), and white (green) — identifying subsidies that are obviously bad (black), those that may be bad or are legitimately contentious (gray), and those that are totally benign (white).[9] However, these taxonomies are, in many respects, highly problematic.

Black Subsidies

Conventional understanding has it that pure export subsidies — cases where a government subsidizes goods for export but not for domestic consumption — are the most objectionable and trade-distorting forms of subsidies and provide the strongest case for both international and domestic countervailing sanctions.[10] This understanding is reflected in Track I of the Tokyo Round GATT Subsidies Code.

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[9] See John Jackson, *The Perplexities of Subsidies in International Trade*, Law and Economics Workshop Paper (Toronto: University of Toronto, 1989).

It may be true that such subsidies represent a foolish misallocation of resources by the subsidizing state — in effect giving away its goods to foreigners below cost — and may distort the efficient global allocation of resources by squeezing out more efficient third-country producers from the importing country's market. Why, then, should the importing country, in terms of its own economic welfare, have the slightest reason to object? Why should importing countries object to dumped — low-priced — imports? In the case of subsidized imports, the importing country should instead express its gratitude to the subsidizing country for foreign aid, noting only its regret that the subsidies are not greater and timeless. This is subject to the narrow exception of predatory subsidization, which, if it exists, should be dealt with along with predatory dumping under domestic antitrust laws.

The general economic case for countervailing duties in the case of pure export subsidies is as tenuous as the general economic case against dumping.[11] Injured third-country exporters should be given standing either before bilateral dispute resolution mechanisms — in the case of the Canada-U.S. Free Trade Agreement — or be able to invoke GATT Panel Complaint procedures to vindicate a claim for nullification or impairment. In cases where countries are tempted to engage in self-destructive and trade-distorting subsidy wars to capture third-country markets — such as wheat exports to eastern European countries — a methodology should be internationally negotiated to establish a common trade-distorting measuring stick in order to facilitate international subsidy-reduction negotiations (as with tariff concessions), and to encourage concessions across classes of trade-distorting policies. As with dumping, equity concerns about the distributive or community effects of disruptive imports may provide a stronger basis for intervention by importing countries, but, as in the case of dumping, I believe that this is the proper domain of domestic adjustment assistance policies or, at the limit, a well-structured safeguards regime.

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[10] See John J. Barcelo, "Subsidies and Countervailing Duties: Analysis and a Proposal," *Law and Policy in International Business* 9 (1977).

[11] See John J. Barcelo, "The Two-Track Subsidies Code: Countervailing Duties and Trade Retaliation," in John Quinn and Philip Slayton, eds., *Non-Tariff Barriers after the Tokyo Round* (Montreal: Institute for Research on Public Policy, 1980); and Alan O. Sykes, "Countervailing Duty Law: An Economic Perspective," *Columbia Law Review* 89 (1989).

White Subsidies

White subsidies are viewed as totally benign and do not justify either international or unilateral sanctions. Generally available subsidies are not seen as trade distorting with respect to either imports or exports because they do not disproportionately influence the price of particular categories of goods. Hence, general social, educational, and infrastructure expenditures are viewed as "white" subsidies.

This view reflects, in part, a rather static conception of comparative advantage. Clearly, many developed economies owe a significant part of their international comparative advantage to social investments in health, education, law and order, basic research, and physical infrastructure. Most modern international trade theorists believe comparative advantage is a dynamic concept and is not entirely externally determined.[12] In many cases of generally available subsidies, public goods characteristics may justify the subsidies on efficiency grounds. Many selective subsidies may also find support on efficiency grounds:

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[12] See, for example, Richard G. Harris, *Trade, Industrial Policy and International Competition*, Royal Commission on the Economic Union and Development Prospects for Canada Collected Research Studies 13 (Toronto: University of Toronto Press, 1985).

- subsidies to research and development in certain industries to offset positive externalities, and subsidies for pollution abatement in certain industries to respond to negative externalities;
- what some researcher call, rather opaquely, potential private-public intersectorial economies, which apparently embrace the collective validation of all kinds of preferences that may not be adequately captured in private market transactions — protection of national security, preserving the family farm and rural lifestyles, promoting regional development, and so on; and
- the possibility that a positive government benefit to a firm may be designed to offset some other government-imposed burden — high minimum-wage laws, especially demanding occupational health and safety, plant closing or environmental obligations.[13]

However, it may still be the case that generally available subsidies are presumptively more benign than selective subsidies because they are less likely to be the product of rent seeking by special-interest groups.

It may also be the case that generally available subsidies are reflected more fully in exchange-rate adjustments than selective or targeted subsidies. But in an international environment where exchange rates are determined increasingly by international capital flows rather than goods flows, it is not clear how robust this assumption is, or when one can be confident that generally available subsidies have induced appropriate exchange-rate adjustments while more selective subsidies have not. In any event, it is clear that even though generally available subsidies may substantially shape international comparative advantage, it would be inconceivable that any domestic government would accept bilateral or multilateral constraints on its sovereign capacity to pursue such basic policies of the modern democratic state, or accept that such policies should be countervailable. This concern is reflected in the ambivalent language of Track II of the Tokyo Round GATT Subsidies Code, especially Article 11. This view also necessarily implies that we no longer have an easy touchstone for which subsidies are objectionable: "black" subsidies seem totally unobjectionable, on economic welfare grounds, to importing countries; "white" subsidies should properly be unobjectionable, on political sovereignty grounds, sometimes on public goods grounds, and to the extent that they make our exports to foreign markets cheaper, then also in terms of the net economic welfare effects on the importing country — as in the case of subsidized exports.

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[13] See Warren Schwartz and Eugene W. Harper, "The Regulation of Subsidies Affecting International Trade," *Michigan Law Review* 70 (1971–72); C.J. Goetz, L. Granet, and W.F. Schwartz, "The Meaning of 'Subsidy' and 'Injury' in the Countervailing Duty Law," *International Review of Law and Economics* 6 (1986); and Richard Diamond, "A Search for Economic and Financial Principles in the Administration of U.S. Countervailing Duty Law," *Law and Policy in International Business* (forthcoming, 1990).

Gray Subsidies

Gray subsidies appear to fall into two principal subcategories: selective domestic subsidies with export spillovers, and those having the intent or effect of squeezing out imports.

Selective Domestic Subsidies with Export Spillovers

Here, the subsidy in question subsidizes selective domestic producers and, hence, reduces the prices faced by consumers of their products in both domestic and export markets — that is, the subsidies are not confined to goods sold and consumed in foreign markets.

In such cases, my economic analysis is the same as for "black" subsidies. Foreign importers should take our subsidies and run. Net economic welfare in the foreign market is increased by the subsidies and, hence, there is no conceivable domestic economic justification for unilateral countervail actions. To the extent that the subsidies squeeze a third country's exports, then the third country should, as in the case of "black" subsidies, have a right of complaint. The country should receive standing before the bilateral dispute resolution process as it might evolve. Alternatively, a GATT Panel Complaint may result in a basis for a demand for compensation, or a right of retaliation; but obviously not countervail, since the subsidized products are not entering the third country's markets.

Selective Domestic Subsidies That Squeeze Out Imports

Here, conceptually, the problem is in distinguishing selective domestic subsidies from "white" subsidies, given that all of them are likely to shape comparative advantage to some degree or another. In this case, countervail is not available — the subsidized goods are being consumed domestically in preference to foreign imports as a result of the subsidies. However, assuming we can solve the conceptual question, some sanctions may be necessary in such cases. Domestic subsidies can be designed to replicate the effect of a tariff, and to the extent that a country has agreed to lower or eliminate its tariffs on given products, the introduction of such subsidies may be a nullification or impairment of a benefit conferred or obligation undertaken by prior agreement.

Safeguards

One of the major issues on the agenda of the Uruguay Round of the GATT is reform of the safeguards or escape clause relief regime of Article XIX. This article permits a state to withdraw or modify previous trade concessions when these have resulted in a surge of imports that cause or threaten to cause serious injury to domestic producers of like or directly competitive products. Safeguard action may be taken for such time as may be necessary to prevent or remedy such injury. A government that invokes safeguard relief normally attempts to negotiate "compensation" with foreign governments whose exports are substantially affected by the action, typically taking the form of alternative trade concessions of equivalent value. Failing agreement on compensation, foreign governments are entitled to withdraw trade concessions of their own of equivalent value.

Efforts during and after the Tokyo Round to negotiate a new safeguards regime proved abortive. With the continuing proliferation since then of the "new protectionism", many manifestations — for example, voluntary export restraints, orderly marketing agreements — represent transparent circumventions of the letter or spirit of Article XIX. It has become a matter of even greater urgency during the current round of multilateral trade talks to negotiate an effective agreement that imposes a higher measure of discipline on safeguard actions. Some features of the safeguard provisions (Chapter 11) in the Canada-U.S. Agreement may provide instructive guidance in a multilateral context.

As I have argued above, to the extent that present antidumping and countervailing duty mechanisms are motivated by understandable concerns over the distributive or community impacts of disruptive imports, I believe that the weight of these concerns should be shifted from the obfuscating context of antidumping and countervailing duty laws. If these concerns cannot be addressed adequately under domestic adjustment assistance programs, they should be dealt with squarely under an appropriately structured safeguards regime. This involves a shift in focus, in the context of contingent protection, *from the causes of trade increases to the nature of trade impacts.*

I have argued elsewhere that not every distributive impact should count in qualifying for safeguard relief.[14] Given the highly disproportionate domestic consumer costs resulting from trade restrictions, investors seem to have no compelling normative claim for being shielded from the risks and vagaries of international trade. However, a social contractarian perspective on distributive justice would urge particular sensitivity to the lot of the least advantaged in our society.[15] In a trade context, this would seem particularly to implicate immobile, unskilled, low-income workers — textile and clothing workers, but not auto and steel workers. A community perspective may also urge a concern for the integrity of established communities whose viability may be imperiled by the sudden contraction or collapse of domestic industries on which such communities have become substantially dependent. Even in these two cases, apart from foreign exporters, invoking safeguard relief will impose substantial costs on domestic consumers, and should only be applied when less drastic alternative forms of adequate adjustment assistance are not available. A "minimal impairment" or "least drastic means" test should be considered when judging the necessity of safeguard relief.

To operationalize these concepts, a radically new definition of "serious injury" is required, focusing not on "domestic industry," but rather on least advantaged workers and dependent communities, subject to the proviso that less drastic forms of adequate adjustment assistance are not available. Unfortunately, the political economy of the consultative process that has been instituted with respect to trade negotiations in both the United States and Canada and multilaterally, which centers on industry advisory committees, is currently heavily weighted toward domestic producer interests and unduly discounts interests that have serious normative claims to assistance. Restructuring the consultative process may be a political precondition to the realization of a redefined injury test. Assuming, crucially, that a new injury test can be negotiated along the lines proposed, I would envisage a safeguards regime as embodying the following additional characteristics:

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[14] See Michael Trebilcock, "Reforming the GATT Safeguards Regime," *Canadian Business Law Journal* 15 (1989), which draws on a larger study of trade-adjustment policies by Michael Trebilcock, Marsha Chandler, and Robert Howse, *Trade and Transitions* (London: Routledge, 1990).

[15] This perspective is developed most prominently by John Rawls, *A Theory of Justice* (Cambridge, Mass.: Harvard University Press, 1971).

- Its invocation should not be confined to injuries caused by prior trade concessions, but be available in the case of any trade impact — whatever the cause of the increase in trade — that meets the proposed injury test.
- It should not be transitional — as contemplated by the Canada-U.S. Agreement — but a permanent regime.
- Safeguard actions should not be confined to tariffs — as under Article 1101 of the Agreement. Instead, they should include auctioned quotas with transparency properties similar to tariffs, but with more predictable protective impacts. In both cases, the additional government revenues that are generated should facilitate the search for alternative adjustment-cushioning policy instruments. Other, less transparent quantitative restrictions presently permitted by Article XIX of the GATT, which *inter alia* confer scarcity rents on foreign exporters but generate no additional government revenues, should be prohibited.
- Safeguard actions should be permitted for up to five years, but should be nonrenewable.
- Where legitimate safeguard action is taken that satisfies the above conditions, it is not clear why compensation should be paid in the form of new trade concessions of equivalent value, or why retaliation, in the absence of compensation, should be permitted.[16] It seems useful to

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[16] On this issue, I differ with Alan O. Sykes, "Protectionism as a 'Safeguard': A Positive Analysis of GATT Article XIX with Normative Speculation," *University of Chicago Law Review* (forthcoming, 1991).

think of a safeguards regime as providing a limited form of risk sharing in the event of unforeseeably disruptive import surges — rather analogous to doctrines of frustration or impossibility in domestic contract law. This is fully consistent with theories viewing safeguards regimes as promoting trade liberalization by reducing the risks associated therewith.[17]

- It seems to me impossible any longer to maintain the principle of nondiscrimination in a pure form in a new safeguards regime. Countries with legitimate reasons to restrain import surges naturally wish to direct restraints at the source of the surges and not at other imports. The foreign suppliers of these other imports naturally see no reason why they should be implicated in the restraints. Their sense of grievance, and the possibility of retaliation from them if safeguard measures are invoked on a most-favored-nation basis, seems a curiously indirect and contorted way of constraining inappropriate safeguard actions. Most of the illicit substitutes for Article XIX safeguard actions are discriminatory. But what renders them more objectionable is the circumstances in which they are invoked and the types of restrictions imposed. Article 1102 of the Canada-U.S. Agreement provides useful guidance in mitigating the "sideswipe" phenomenon by exempting from safeguard action imports that are not "substantial" and are not "contributing importantly to the serious injury" of the importing party. Imports in the range of five to ten percent of total imports are deemed normally to meet this test. This approach might be extended to the multilateral context.
- If the foregoing conditions are met, safeguard relief should be available as a matter of right following appropriate administrative determinations, and not — as at present — as a matter of political discretion.

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[17] Ibid.; and Kenneth W. Dam, *The GATT* (Chicago: University of Chicago Press, 1970), p. 99.

Currently, antidumping and countervailing duty laws, along with bilaterally negotiated quantitative restrictions — for example, voluntary export restraints — have become almost complete substitutes for safeguard action. An inspection of Appendix Tables A-1 to A-4 discloses that the 132 safeguard actions taken under Article XIX of the GATT in almost four decades contrasts with approximately the same number of antidumping actions each year, almost the same number of countervailing duty laws in the most recent four years reported in the tables, and approximately the same number of new bilaterally negotiated restraint agreements in less than one year (1987–88). The popularity of antidumping and countervailing duty laws is largely explained by their selective application, the absence of a requirement of compensation or right of retaliation, and the absence of political discretion in their application. Bilaterally negotiated quantitative restrictions also share the first two properties, and while lacking the third, offer restrained foreign exporters the solace of contrived scarcity rents from the restraints. Changing the political dynamics surrounding these regimes requires attention to these critical institutional differences if the safeguards regime is not to remain a poor cousin to its intellectually indefensible substitutes. The safeguards regime proposed above is sensitive to these dynamics in permitting a measure of selectivity, in removing any provision for compensation or retaliation, and in making relief available as of right if the stipulated conditions are met. However, these are not merely political compromises; they are fully consistent with a principled safeguards regime.

These proposals clearly can apply only to new safeguard actions. This leaves us with the formidable problem of what to do about existing safeguard actions that do not comply with present or proposed international norms. In particular, the escalating circumventions of Article XIX — in the form of "gray-area" measures such as voluntary export restraints, orderly marketing agreements, and so on — pose a central difficulty. The Multifibre Arrangement is the most extreme example of this difficulty.

Perhaps the first proposal that might be ventured is to seek agreement on a "standstill" on the creation of further such arrangements, forcing these into the framework proposed above, and forestalling further tendencies to "cooperative protectionism." As to existing arrangements of this kind, there may be merit in the idea of first requiring notification of their existence to a GATT Safeguards Committee and then requiring that within, say, a three-year time frame, all such restrictions should be converted into either tariffs or auctioned quotas, but otherwise be grandfathered into the proposed new safeguards regime — that is, not be time-limited. In the process of converting existing restrictions into tariffs or auctioned quotas, one can readily envisage intense bilateral negotiations to reduce the scale of the restrictions — given the scarcity rents that foreign producers will be required to sacrifice — or to reduce tariffs or other trade restrictions on other products or services by way of compensation.

Beyond the initial conversion date, further periodic reciprocal negotiation of reductions of remaining restrictions might be envisaged, in part precipitated by the greater transparency that the restrictions will exhibit, and, in particular, the more obvious the detrimental impact on domestic consumer welfare. Again, the revenue-generating potential of the substituted tariffs or auctioned quotas will facilitate the search for alternative adjustment-cushioning policy instruments by domestic governments.

To make the total proposed safeguards package fly politically, Japan, the newly industrializing countries, and other countries that see themselves in jeopardy of inappropriate safeguard actions or illicit substitutes will have to be prepared to offer significant trade concessions in other contexts — for example, agriculture, services, and intellectual property — in return for a new safeguards regime. It would seem politically futile to attempt to negotiate a new safeguards regime, as occurred during and after the Tokyo Round, without explicitly linking trade concessions across these various contexts, so that export-oriented domestic industries can be enlisted as supporters of the safeguard reforms. As with other GATT Codes, a new Safeguards Code could be negotiated on a conditional most-favored-nation basis to ensure that all beneficiaries are required to contribute trade concessions to the countries constrained most by the new code. Thus, the outlines of a deal seem discernible. It would be a signal failure of the Uruguay Round if it were not seriously pursued.

Domestic Adjustment-Assistance Policies

If we accept the argument that there is no rigorous economic case for most forms of administered protection, then — as I have suggested — the real issue becomes: How justifiable, under a reformed safeguards regime, is protection in terms of the noneconomic communitarian and distributive justice goals that remain as its only legitimate purposes? Here we have to confront the fact that, in terms of the domestic welfare of the protecting state, trade restrictions are generally a far more expensive means of preserving jobs than other adjustment policies, ranging from production subsidies to labor-adjustment policies. To cite some dramatic examples, in the U.S. steel industry, trade restrictions cost consumers US$1 million per year for each job saved; in the U.S. auto industry, US$160,000 per year; and in the Canadian textile industry, C$35,000 per year. Average annual wages in these industries were, respectively, US$60,000, US$40,000, and C$10,000 during the time these costs of protection were borne by consumers. Even a 100 percent wage subsidy for all affected workers would have served the purpose of job preservation, but at vastly less cost to consumers.[18]

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[18] Trebilcock, Chandler, and Howse, *Trade and Transitions*, pp. 75, 76.

Proof that lower-cost alternatives are not available to meet given objectives should be required under domestic law as a precondition for safeguards relief. Of course, most demands for protection are phrased in terms that suggest such measures are part of a strategy to restore the industry to competitiveness, or are responses to the "unfair" practices of other states. Since the evidence suggests that protection rarely does the former — instead it usually retards the process of rationalization and modernization — and, apart from extremely rare instances of predation, the latter notion of unfairness is incoherent, choosing between protection and industrial or labor subsidies should mean choosing the least costly policy to address ethical concerns about workers and communities.

In small communities dependent on a single firm or industry, letting firms fail but helping workers adjust may not be feasible. In such cases industrial subsidies or safeguards protection may be the only viable means of vindicating communitarian and/or distributive justice concerns. Even here, however, a careful mix of policy instruments could often be crafted to be less distortive of allocative efficiency and less prejudicial to consumer welfare than present contingent protection measures. For instance, facilitating conversion of a physical plant for other uses, assisting worker buyouts, early retirement packages for older workers, plant-closing laws, and relocation and retraining assistance for younger workers can provide a principled response to communitarian and distributive justice concerns. In general, I strongly favor policies that subsidize exit options rather than stay options.

These measures should be contrasted with Canadian programs that aid the textile, clothing, and footwear industries, and that have the purported goal of rationalizing these industries. Since rationalization and improved productivity are usually achieved through substitution of capital for labor, this kind of assistance does not address the problems workers face, but may even aggravate them. Moreover, these programs carry with them an implicit guarantee of protection until rationalization has been achieved. They therefore may actually reduce market incentives for adjustment by creating embedded expectations that, come what may, government will not let the industry fail. The knowledge that government has at its disposal a panoply of policy instruments tailored to cope with worker dislocation is likely to substantially reduce a firm's expectations that they can hold workers and communities hostage for a ransom of rents from trade restrictions and industrial subsidies.

In summary, domestic adjustment assistance should focus much more on the labor market and its distinctive characteristics than on firm-specific or industry-specific aid. The de Grandpré Report, a recent Canadian government study of adjustment policies, while disappointingly uncritical of traditional industrial assistance policies, suggests that plant closing laws can also play a positive role in adjustment.[19] The empirical evidence strongly suggests that a six-month advance notice of plant closings considerably aids the adjustment process.[20] The most re-employable workers see the writing on the wall and often find new jobs even before their existing positions become redundant. Advance notice gives workers time to adjust to the shock of change,and to consider the available coping options. Furthermore, local, regional, provincial, and federal governments have some lead time to grasp the magnitude of the adjustment problem and to devise the most cost-effective mix of policy responses.

This approach runs counter, of course, to what has been described as "the common assumption of neoclassical labour market economists...that the minimization of recruitment costs and maximization of ease of dismissal were essential for allocative efficiency in the use of labour."[21] One tentative lesson that may be drawn from the relative success of adjustment in different advanced industrial societies is that regarding labor as a fungible commodity may be economically counterproductive. Legal or culturally determined guarantees of employment security in Germany and Japan may have significantly increased firms' investment in worker skills development and led to increased workforce productivity. Conversely, attracting talented persons into the industrial workforce and encouraging an appropriate investment by those workers in firm- or industry-specific skills may be greatly aided by guarantees of employment security, generous severance packages, and other firm-generated adjustment policies. Purely market-led adjustment, which forces skilled industrial workers to take "survival" jobs at lower wages and frequently jeopardizes the economic security of their families, generates high social costs and impedes the development of a highly productive and stable industrial workforce. Again, the adjustment success stories of Germany and Japan have usually been explained largely in terms of firm- and industry-targeted policies, while the structure of labor relations and the nature of labor markets has been less adequately studied.[22] The Swedish experience with labor market adjustment policies also merits close study.[23]

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[19] Advisory Council on Adjustment, *Adjusting to Win* (Ottawa: Supply and Services Canada, March 1989).

[20] The evidence is surveyed in Robert Howse, "Equal Partners in Adjustment: The Economic Logic of Plant Closing Restrictions" (unpublished manuscript, Faculty of Law, University of Toronto).

Finally, the substitutability of labor-market instruments and industrial subsidies in a more limited range of cases for more costly trade protection presupposes the ability of the domestic tribunal administering safeguards to estimate the possibilities for substitution when it applies a "minimal impairment" test. Here, there is a strong case for a domestic transparency agency — to some extent modelled on the Australian Industries Assistance Commission — that might estimate the costs and benefits of all substitute instruments against the appropriate normative criteria for relief. This function could be assimilated into an even broader mandate for the Canadian International Trade Tribunal or the United States International Trade Commission. There might be advantages in having a separate organization at arms-length from the administered-protection process, staffed by persons independent of the government, and representative of the full range of interests at issue — consumers, workers, affected communities — that would, in theory, be less susceptible to capture. Such an organization might also conduct ongoing public scrutiny of safeguard protection to determine if the purported public goals are being achieved — at least cost to domestic economic welfare — by the measures in question. Another of its functions could be to recommend structural reforms — for example, in plant-closing legislation or unemployment insurance — that might enhance the availability of adequate substitutes for trade protection.

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[21] R. Dore, "Rigidities in the Labour Market," *Government and Opposition* (Autumn, 1988), p. 401.

[22] An outstanding exception is R. Dore, *Flexible Rigidities: Industrial Policy and Structural Adjustment in the Japanese Economy 1970–80* (London: Athlone Press, 1986).

[23] See Trebilcock, Shandler, and Howse, *Trade and Transitions*, chap. 4.

Safeguards, Contingent Protection, and the Uruguay Round

At a multilateral level, the implications of the above analysis for future negotiations in the GATT on subsidies and safeguards are potentially quite far reaching. The Tokyo Round Subsidies and AntiDumping Codes represented an effort to acknowledge and to contain U.S. concerns about "fair trade". Subsidies were not prohibited explicitly, but retaliation through countervail was permissible, provided it was the outcome of an administrative process in which certain criteria were met and certain procedural constraints observed. The aim was, in part, to depoliticize the domestic trade remedy process, replacing discretionary judgments by the executive with supposedly impartial application of consistent criteria by administrative agencies.[24]

Of course, in the Tokyo Round, no agreement was reached regarding the classification of domestic (nonexport) subsidies as acceptable or unacceptable (countervailable) behavior. Thus, one approach that some of the GATT Contracting Parties are pursuing in the Uruguay Round would be to spell out definitively the different categories of subsidies. My own preference would be to undo the Tokyo Round approach, to admit that "unfair" trade is a largely incoherent idea, and to discipline the protectionist demands that drive countervail and antidumping actions by subjecting them to the strictures of a revamped Article XIX.

As others have noted, one of the critical weaknesses in the present safeguards regime is that importing states are essentially left to be judges in their own case.[25] The GATT, for various reasons connected with its own peculiar institutional history, has never developed an established mechanism to monitor and scrutinize the trade policies of its Contracting Parties. Proposals for an international transparency agency, linked to the GATT, which would estimate the costs and benefits of all forms of protection, have become increasingly prominent in the trade policy literature and have found their way into the Uruguay Round discussions.[26] I agree with David Richardson's suggestion that this kind of agency could play a vital role in giving "teeth" to a broadened safeguards regime.[27]

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[24] J.M. Finger, "The Political Economy of Administered Protection," *American Economic Review* 72 (1982).

[25] See, for example, David Richardson, "Safeguards Issues in the Uruguay Round and Beyond," in J. Baldwin and D. Richardson, eds., *Issues in the Uruguay Round* (Cambridge, Mass.: National Bureau of Economic Research, forthcoming).

[26] These proposals are discussed in detail in Trebilcock, Chandler, and Howse, *Trade and Transitions*, chap. 6.

[27] Ibid.

For instance, the importing state might be required to submit its justification for safeguard protection to the scrutiny of the agency either before the safeguards could be imposed or at least *ex post*. The agency could also review on an ongoing basis whether the protection is justified as the means to vindicating legitimate normative claims that least impair the welfare of other states. The agency could perhaps play a role somewhere between mere reporting of costs and benefits, and binding arbitration. It could publicly report whether safeguards were justified under the revised Article XIX criteria, thereby making abuses of the regime widely known in the international community.

To advocate the replacement of "unfair" trade remedy laws with a comprehensive safeguards regime is not to deny that global economic welfare might be enhanced by the reduction of some domestic subsidies. It is the case for countervailing duties that makes no sense, not the case for reducing some subsidies. Although it has been suggested that the appropriate use of countervail may actually lead to a reduction in the use of subsidies, there is little empirical evidence to suggest that imposition or threat of contingent protection actually alters the domestic policies of states.[28]

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[28] Jackson, *The Perplexities of Subsidies in International Trade*. Even those sympathetic to the "strategic" use of trade remedy laws are able to find few examples where their use has actually resulted in reduction of subsidies or other nontariff trade barriers. A prominent example, U.S.-Japanese semiconductor trade, shows the difficulties of using trade sanctions as a threat to induce negotiations on removal of such barriers. An agreement was reached under threat of action under the old Section 301 of the U.S. *Trade Act* and after antidumping suits were filed, but it failed to result in the desired "liberalization" of the Japanese home market and, in turn, led to the imposition of trade sanctions against Japanese consumer and office goods. Although the supposed objective was to "liberalize" trade, protection increased and U.S. manufacturers of consumer and office goods gained windfall rents from the purportedly "strategic" demands of the U.S. semiconductor industry. See H. Milner and D. Yoffie, "Between Free Trade and Protectionism: Strategic Trade Policy and a Theory of Corporate Trade Demands," *International Organization* (Spring 1989), p. 238.

The GATT may have an appropriate role to play in facilitating agreement among states to reduce subsidies. However, the GATT is more likely to achieve success, not through a ban of some supposedly pernicious subclass of subsidies enforceable through unilateral retaliation, but through facilitating negotiation of mutually advantageous concessions among the Contracting Parties. It is through negotiated reciprocity that the GATT achieved its clearest success — the drastic reduction of tariff barriers.

When subsidy wars threaten a tragedy of the commons, mutual agreement to halt or constrain subsidization in a particular sector may be possible. In comparison, tariff reduction did not occur because trading states suddenly recognized the cogency of the economic argument that tariffs distort global allocative efficiency. Similarly, the focus regarding subsidies should be on facilitating, through the GATT, Pareto-superior bargains, where subsidies are reduced reciprocally or "traded" against reduction of other trade restrictions.

Jagdish Bhagwati has suggested "that the institutions governing trade policy be supplemented by procedures aimed at ensuring a broad balance of advantages from artificial subventions in a limited number of high technology industries" that are susceptible to efforts to capture the world market in a given product by outsubsidizing one's potential competitors.[29] Here, the argument does not emphasize a supposed "unfairness" in this particular kind of subsidy, but is rather an instance of the case for long-run cooperative behavior as a superior substitute for "tit for tat".[30]

A similar case for mutual reduction of subsidies exists where several states are sustaining excess capacity in declining industries through constantly increasing subsidization. At some point, the cost of matching the increases of every other state's subsidy becomes prohibitive, thereby making negotiated restraints fruitful. Such restraints might involve an agreement to focus subsidy policies on orderly reduction of capacity through severance pay settlements to older workers, other public assistance for worker retraining and relocation, or regional subsidies to create jobs in other sectors in the regions concerned.

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[29] Jagdish Bhagwati, *Protectionism* (Cambridge, Mass.: MIT Press, 1988), p. 110.

[30] Robert Axelrod, *The Evolution of Cooperation* (New York: Basic Books, 1984).

Although there are quite broad prohibitions on subsidies in the Treaty of Rome, the European Commission has recently tried to enforce them in the limited cases where subsidies sustain excess capacity, and are therefore likely to lead to more subsidy costs for everyone. It has generally permitted some subsidies in the sectors concerned, provided they are attached to a plausible plan to reduce excess capacity.[31]

The GATT requires better institutional machinery for negotiation and supervision of these kinds of partial, sector-specific subsidy regimes. Creating an institutional framework to facilitate such specific regimes is a more appropriate task for the GATT than the elusive search for a universal taxonomy of good and bad subsidies.

A transparency agency may also play a positive role here, by monitoring subsidy and trade policies, and calculating subsidies in tariff equivalents, thus providing a kind of common bargaining currency. For instance, in the steel sector, the United States might agree to remove some existing voluntary export restraints or contingent protection actions in return for European commitments to use subsidies to reduce, rather than sustain, excess capacity. Clearly, in order to make such commitments plausible, some kind of independent surveillance mechanism is essential. To refer for a moment to a quite different area of international negotiations, it is widely accepted that the possibility for good arms control agreements rests on the feasibility of verification procedures that ensure against flagrant cheating. Clearly, bargains that involve not just reduction in tariffs, but domestic policy reforms, present verification problems that the existing GATT machinery simply has not been designed to handle. If we can multilaterally develop a good answer to the verification problem, we may see more agreements that address domestic subsidies.

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[31] See Robert Howse, "Government Equity Participation as a State Aid in the European Community" (Unpublished manuscript, Faculty of Law, University of Toronto), pp. 1–10.

My approach suggests that, at the multilateral level, the issues of contingent protection and of procurement of welfare-enhancing reductions in subsidies and other nontariff barriers should be kept analytically and institutionally distinct. The contingent protection regime should be regarded as an international means of discipline and surveillance of any country that temporarily deviates from existing liberalization commitments, where domestic adjustment pressures have proved particularly severe. Reduction of subsidies, on the other hand, should be treated as tariffs have been treated in previous GATT rounds: the aim should be global welfare-enhancing bargains based on a broad balance of concessions (negotiated reciprocity). At a more theoretical level, the issue of subsidies and nontariff barriers is essentially one of expanding existing commitments, whereas the issue of contingent protection is that of preserving those commitments in hard times.

Conclusions

The three major contingent protection regimes have failed totally to identify relevant and defensible efficiency and equity considerations. I believe that we can achieve a degree of coherence after we have reformulated these regimes both bilaterally and multilaterally as suggested in my analysis. Layering political compromise after political compromise on an analytically incoherent foundation holds little prospect of meaningful progress. My ideal world is one where we have abolished antidumping and countervailing duty laws and pre-empted bilaterally negotiated quantitative restrictions, and where we are left, in terms of contingent protection measures, with a well-conceived safeguards regime. We have the opportunity during the current round of multilateral negotiations and the ensuing round of bilateral negotiations to make major progress to this end, and to advance the cause of a liberal international trading order.

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Table A-1

Antidumping Investigations and Actions by Selected Industrial Countries, 1981–87[a]

	1981		1982		1983		1984	
	Investigations	Actions	Investigations	Actions	Investigations	Actions	Investigations	Actions
Australia	49	28	77	47	80	58	56	36
Industrial countries	34	14	55	25	59	44	30	26
Developing countries	15	11	20	20	21	13	21	10
Centrally planned economies		3	2	2		5		
Canada	23	13	72	21	36	41	31	16
Industrial countries	12	8	54	10	27	29	20	9
Developing countries	8	1	15	7	7	10	8	5
Centrally planned economies	3	4	3	4	2	2	3	2
European Community	47	16	55	42	36	45	48	31
Industrial countries	9	18	18	9	11	12	16	9
Developing countries	3	5	15	4	9	12	5	6
Centrally planned economies	35	3	22	29	16	21	27	16
United States	14	4	61	45	47	15	71	25
Industrial countries	7	3	47	41	27	9	32	8
Developing countries	4		13	3	19	6	23	17
Centrally planned economies	3	1	1	1	1		16	
Total	*133*	*61*	*265*	*155*	*199*	*159*	*206*	*108*
Industrial countries	62	33	174	85	124	94	98	52
Developing countries	30	17	63	34	56	41	57	38
Centrally planned economies	41	17	28	36	19	24	51	18

Table A-1 - *continued*

	1985		1986		First half 1987^b	
	Investi-gations	Actions	Investi-gations	Actions	Investi-gations	Actions
Australia	63	30	63	10	11	
Industrial countries	38	15	35	7	8	
Developing countries	19	12	20	3	3	
Centrally planned economies	6	3	8			
Canada	36	27	55	45	34	36
Industrial countries	18	16	21	18	21	20
Developing countries	12	8	30	17	10	12
Centrally planned economies	6	3	4	10	3	4
European Community	45	12	37	21	10	8
Industrial countries	9	9	11	9	2	3
Developing countries	16	1	8		4	1
Centrally planned economies	20	2	8	12	4	4
United States	65	53	70	50	47	43
Industrial countries	19	19	30	15	32	25
Developing countries	41	20	34	32	13	10
Centrally planned economies	5	14	6	3	2	8
Total	*209*	*122*	*225*	*126*	*102*	*87*
Industrial countries	84	59	97	49	63	48
Developing countries	88	41	92	52	30	23
Centrally planned economies	37	22	26	25	9	16

Table A-1 *(Notes)*

[a] The countries listed have initiated virtually all the antidumping investigations undertaken worldwide. Actions taken include the imposition of definitive duties and minimum price undertakings by exporting countries. Investigations include those opened in the context of reviewing an existing antidumping clause or after allegations of breach of an undertaking.

[b] The data are based on actions reported by signatories to the GATT Committee on Antidumping Practices, which exclude the actions taken against nonsignatories.

Source: Margaret Kelly et al., *Issues and Developments in International Trade Policy* (Washington, D.C.: International Monetary Fund, 1988).

Table A-2

Countervailing Investigations and Actions by Selected Industrial Countries, 1981–86[a]

	1981		1982		1983	
	Investigations	Actions	Investigations	Actions	Investigations	Actions
Australia			3		7	9
Industrial countries			3		7	9
Developing countries						
Centrally planned economies						
Canada		3	1		3	
Industrial countries		3	1		3	
Developing countries						
Centrally planned economies						
European Community	1	1	3		2	3
Industrial countries			1		1	1
Developing countries	1	1	2		1	2
Centrally planned economies						
Japan Industrial countries					1	
United States	10	6	124	80	21	21
Industrial countries	6	1	85	61	3	3
Developing countries	4	5	39	19	16	18
Centrally planned economies					2	
Total	*11*	*7*	*131*	*80*	*34*	*33*
Industrial countries	6	1	90	61	15	13
Developing countries	5	6	41	19	17	20
Centrally planned economies					2	

Table A-2 - *continued*

	1984		1985		First half 1986^b	
	Investi-gations	Actions	Investi- Actions	gations	Investi-gations	Actions
Australia	6	1	3	1	1	2
Industrial countries	5	1	3	1	1	2
Developing countries	1					
Centrally planned economies						
Canada	2	2	2	2		1
Industrial countries	2	2	1	1		1
Developing countries			1	1		
Centrally planned economies						
European Community	1	1				
Industrial countries		1				
Developing countries	1					
Centrally planned economies						
Japan (Industrial countries)						
United States	50	18	40	24	28	28
Industrial countries	14	2	12	6	8	10
Developing countries	34	16	27	17	20	18
Centrally planned economies	2		1	1		
Total	*59*	*22*	*45*	*27*	*29*	*30*
Industrial countries	21	6	16	8	9	12
Developing countries	36	16	28	18	20	18
Centrally planned economies	2		1	1		

Table A-2 *(Notes)*

[a] The countries listed have initiated virtually all the countervailing investigations undertaken by individual countries. Actions taken include the imposition of definitive duties and minimum price undertakings by exporting countries. Investigations include those opened in the context of reviewing an existing countervailing duty or after allegations of breach of an undertaking.

[b] The data are based on actions reported by signatories to the GATT Committee on Subsidies and Countervailing Measures, which exclude the actions taken against nonsignatories.

Source: Margaret Kelly et al., *Issues and Developments in International Trade Policy* (Washington, D.C.: International Monetary Fund, 1988).

Table A-3

GATT Article XIX Actions by Selected Countries, 1950–86

	Number of cases	Average duration (months)	Compen-sation	Tariffs	Countries affected
United States					
1950-59	11	85	6	10	38
1960-69	3	117	10	3	10
1970-79	9	47	0	5	35
1980-86	5	43	16	22	99
Total	*28*		*16*	*22*	*99*
Australia					
1950-59	2	8	0	0	3
1960-69	15	45	2	6	32
1970-79	17	33	0	2	40
1980-86	4	18	0	2	3
Total	*38*		*2*	*10*	*78*
Canada					
1950-59	1	..	0	2	2
1960-69	5	73	1	0	3
1970-79	3	20	0	0	18
1980-86	4	31	0	0	9
Total	*22*		*1*	*2*	*32*
European Community					
1950-59	1	..	1	0	3
1960-69	5	73	1	3	15
1970-79	3	22	0	0	5
Total	*19*		*3*	*3*	*45*
Other countries					
1950-59	3	29	3	3	4
1960-69	9	101	2	5	12
1970-79	5	27	0	2	6
1980-86	8	..	..		
				6	..
Total	*25*		*5*	*16*	*22*

Note: Actions currently outstanding have not been included.

Source: G. Sampson, "Safeguards," in C.J.M. Finger and A. Olechavski, *The Uruguay Round: A Handbook on Multilateral Trade Negotiations* (Washington, D.C.: World Bank, 1983).

Table A-4

Export Restraint Arrangements, 1987–88

	September 1987	**May 1988**	**Reported increase between September 1987 and May 1988**
Total export restraint arrangements[a]	135	261	126[b]
By sectoral composition			
Steel	38	52	14
Agricultural and food products	20	55	35
Automobiles and transport equipment	14	17	3
Textile and clothing[c]	28	72	44
Electronic products	11	19	8
Footwear	8	14	6
Machine tools	7	7	
Other	9	25	16
By protected markets			
European Community	69[d]	138[e]	69
United States	48	62	14
Japan	6	13	7
Other industrial countries	12	47	35
Eastern Europe		1	1
By restrained exporters			
Japan	25	28	3
Eastern Europe	20	45	25
South Korea	24	25	1
Other industrial countries	23	59	36
Other developing countries	43	98	55

[a] Includes voluntary export restraints, orderly marketing arrangements, export forecasts, basic price systems, industry-to-industry arrangement, and discriminatory import systems. Excludes restrictions under the Multifibre Arrangement.

[b] Of the reported increase, almost half were in existence prior to 1988, but were reported by the GATT only in that year.

[c] Excludes restrictions under the Multifibre Arrangement.

[d] Includes 20 arrangements involving individual EC member states.

[e] Includes 51 arrangements involving individual EC member states.

Source: Margaret Kelly et al., *Issues and Developments in International Trade Policy* (Washington, D.C.: International Monetary Fund, 1988).

Idealism *versus* Pragmatism: Policy and the Academic Analyst

Michael Hart

Michael Trebilcock offers a stimulating analysis of the inadequacy of the modern contingency protection regime — that is, antidumping and countervailing duties and emergency safeguards, the remedies sanctioned by articles VI and XIX of the General Agreement on Tariffs and Trade (GATT). He asks whether, as an academic analyst, it is his task to develop a realistic or negotiable alternative to the existing scheme or whether he should insist on a more rigorous approach that satisfies stricter criteria. In other words, should he sketch an ideal or a pragmatic alternative? He opts unequivocally for the ideal and leaves the pragmatic to others. To use Trebilcock's metaphor, academics should always throw deep. While I do not want to belabor the metaphor, analysts should, in throwing deep, make sure that there is at least a small chance of someone catching the ball. In reading Trebilcock's proposals, I had the uneasy feeling that he was indeed throwing deep, so deep that the ball was likely to sail well past the end zone and out of play.

For the past three years, I have been on loan from the "practical" world of policymaking and international negotiations to the "ideal" world of academia. Unlike some of my colleagues in government, therefore, I should be expected to have some sympathy for Trebilcock's dilemma and for his decision to stick with the ideal. Unfortunately, I do not. Hard-nosed policy analysts and negotiators in government have always appreciated that a rigorous economic, legal, sociological, or political analysis would expose the shortcomings of the heavily brokered and compromised solutions found in international agreements and implemented in domestic law. Only the most obtuse and myopic individuals in the "practical" world continue to insist that the modern contingency protection system, as it evolved in the 1980s, has much to recommend it.[1] There is a plethora of literature that has more than sufficiently demonstrated how these remedies have become the favorite instruments of protectionist interests and are being abused to meet ends for which they were never intended. They can no longer be considered to meet any public policy objective other than the protection of powerful interest groups.[2]

Trebilcock's paper is in the mainstream of academic analysis that believes there is little to be gained by tinkering with the details of the existing system. Only a wholesale reform based on first principles will satisfy. I do not disagree. The system is broken. Indeed, I believe it may be even more broken than Trebilcock suggests. As has been demonstrated by World Bank analysts such as Patrick Messerlin and others, the antidumping system in Europe, the United States, and elsewhere is being used by large multinational companies to cartelize their industry on a worldwide basis. In effect, the antidumping system is reinforcing practices that are actionable under the competition laws of these same countries. The countervailing duty system involves a unilateral intrusion into the affairs of one government by another to such an extent as to create an extremely corrosive issue in international trade relations. The safeguards regime has deteriorated into a determined effort by governments to avoid the rigors imposed by existing international agreements, and rely instead on extralegal so-called gray area measures.[3]

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[1] To say, however, that there is no intellectual basis for either antidumping or countervailing duties, as Trebilcock suggests, may be going too far. I agree that there is at best a tenuous basis in economics for these measures, but both respond to very strong political imperatives that can be explained in terms of intellectually respectable political theories. Both regimes demonstrate the old adage that "good" economics makes "bad" politics and vice versa. I prefer, however, Trebilcock's distaste for countervailing duties and antidumping on economic grounds to the efforts by such U.S. analysts as Ronald Cass and Richard Diamond, who are trying to put the detailed application of trade remedy laws on a sounder economic footing. See, for example, Ronald A. Cass, *Economics in the Administration of U.S. International Trade Law*, Ontario Centre for International Business Working Paper 16 (Toronto, July 1989); and Richard Diamond, "A Search for Economic and Financial Principles in the Administration of U.S. Countervailing Duty Law," *Law and Policy in International Business* 21 (forthcoming, 1990).

[2] I have written elsewhere on the problems of the contingency protection system with references additional to those provided by Trebilcock. See, for example, Michael Hart, "The Future on the Table," in Richard G. Dearden, Michael M. Hart, and Debra P. Steger, *Living with Free Trade: Canada, the Free Trade Agreement and the Uruguay Round* (Ottawa: Institute for Research on Public Policy and Centre for Trade Policy and Law, 1990); and idem, "The Canada-US Working Group on Subsidies: Problem Opportunity or Solution?" (Paper presented at a conference on subsidies by the Ontario Centre for International Business, Toronto, November 1, 1989).

Given this rather sad state of affairs, one would be forgiven for assuming that efforts in the GATT's Uruguay Round of multilateral trade negotiations are focused on a wholesale reform, throwing out the old and devising a much better alternative. Unfortunately, one would be wrong. In all three areas, tinkering is proving more rewarding than wholesale reform. Far-reaching proposals, while hailed as innovative, imaginative, daring, and even courageous are also routinely filed away as impractical and nonnegotiable. The proposals that garner support from the countries that count — that is, the United States, the European Community (EC), and Japan — are those that proceed from within the existing system and leave it largely intact.

Let us look at some examples. Canada is an energetic participant in the negotiations and has made proposals to reform the international rules governing various aspects of the contingency protection system.[4] Given the rather "advanced," "normative," or "principled" positions Canada took during the bilateral negotiations with the United States leading to the Free Trade Agreement, one would expect these nations, therefore, to seek wholesale reforms. Again, one would be wrong.

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[3] For recent brief analyses of the problems, see Brian Hindley, "Anti-dumping Action: How the GATT Is Threatened," in Murray G. Smith, ed., *Canada, the Pacific and Global Trade* (Halifax: Institute for Research on Public Policy, 1989); and Michael Finger, "Subsidies and Countervailing Duties," in H.E. English, ed., *Pacific Initiatives in Global Trade* (Halifax: Institute for Research on Public Policy, 1989).

In the area of antidumping, Canada has tabled a position paper that in no way questions whether the current regime makes sense or whether something akin to domestic competition rules might be a superior alternative. Let me quote just two short paragraphs from the proposal to illustrate just how far the Canadian discussion paper is removed from first principles and remains firmly rooted within the existing regime:

> The fundamental principle underlying the existing Antidumping Code is that dumping is to be condemned when injurious to domestic producers. Because anti-dumping practices, however, can have an immediate and significant effect on trade, it is essential that the rules be as clear and transparent as possible. In particular, there is a need to ensure greater uniformity and consistency in their implementation and to reduce the potential for arbitrary or unilateral interpretation. A number of provisions of the Code should be made more explicit in order to reduce areas of potential abuse.
>
> Article VI and the Anti-dumping Code, while recognizing the legitimacy of antidumping measures when necessary to remedy injurious dumping, also commits Parties to ensure that such remedial actions do not unduly disrupt trade. The experience gained over the past decade suggests certain areas where the operation of the Code could be improved to better reflect the balanced objectives set out in Article VI and in the Code Preamble.[5]

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[4] I am basing my analysis of Canadian proposals on what can be gleaned from the public record. While there may be more sophisticated documents available clarifying nuances of policy, strategy, and tactics, I think the press releases issued by the Minister for International Trade outlining various Canadian proposals are sufficiently transparent to indicate their deficiencies in terms of the more searching criticisms of the existing regimes.

[5] Canada, Minister for International Trade, Attachment to Press Release No. 314, December 20, 1989.

The discussion paper provides a detailed set of proposals organized under three main headings: "achieving greater procedural uniformity and consistency"; "improving standards for application of anti-dumping measures"; and that perennial Canadian favorite, "dispute settlement." While many of the suggested reforms would undoubtedly help to reduce some of the most flagrant protectionist aspects of current practice, the reforms would in no way move Canada closer to competition principles or lead to the ultimate replacement of antidumping laws by a more rational comprehensive safeguards regime.[6]

In the area of subsidies and countervailing duties, Canada tabled a very detailed negotiating proposal in June of 1989 in the Subsidies Group in Geneva. It reflected Canadian experience with Canadian and U.S. domestic procedures as well as the analytical and negotiating experience of the 1985–87 bilateral Canada-U.S. negotiations. Again, it contains proposals for reform that are firmly rooted within the existing system as sanctioned by GATT Article VI and the 1979 Subsidies Code, organized around the following main elements:

- extending and clarifying obligations regarding prohibited subsidies;

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[6] In this regard, I would like to note here the early and excellent work of two Canadian analysts, Rodney Grey and Klaus Stegemann, who pointed to the fundamental problems inherent in modern antidumping law and practice. See Rodney Grey, "Trade Policy and the System of Contingency Protection in the Perspective of Competition Policy," OECD Document DAFFE/RBP/WP1/86.3, a paper commissioned by the Canadian Department of Consumer and Corporate Affairs for consideration by the Organisation for Economic Co-operation and Development (OECD) Committee on Competition Policy. The paper provides a detailed overview of the differences between competition law and trade policy. See also Klaus Stegemann, "The Consideration of Consumer Interests in the Implementation of Antidumping Policy," prepared for a 1984 OECD Symposium on the Consumer Policy and International Trade and subsequently reworked as "Anti-dumping Policy and the Consumer," *Journal of World Trade Law* 19 (1985). U.S. Commerce Department representatives to the OECD Committee thought Grey's study was sufficiently seditious that they insisted that it not be published as an OECD document other than as a committee working paper.

- developing more precise criteria sanctioning the use of countervailing duties for nonprohibited but countervailable or otherwise actionable subsidies;
- proposing clear rules for identifying the kinds of practices that should be nonactionable or noncountervailable; and
- reviewing notification and surveillance obligations and procedures and other dispute settlement provisions in the light of progress on the first three points.[7]

The proposal incorporates some major improvements over the status quo while at the same time avoiding some of the more difficult pitfalls of previous attempts to negotiate rules on subsidies. It avoids the problem of negotiating lists or of developing detailed criteria spelling out prohibited and permitted practices. It would spell out more clearly that not all government assistance programs distort trade and, therefore, should not be subject to sanctions. But the proposal builds on the existing Code and accepts the basic premise of the Code that many government practices are trade distorting and should be offset by unilaterally determined countervailing duties. From Trebilcock's perspective and that of many other academic analysts, the proposal risks losing sight of the object of the negotiations. The problem is not subsidies but countervail. That problem is addressed head on, but in the context of a framework that seeks to impose rules on subsidies, the approach taken during the Tokyo Round with questionable results.

In the area of safeguards, Canada is participating actively in negotiations based on proposals advanced by the chairman that would involve "disciplined" abandonment of the old, most-favored-nation principle — that is, the consenting-adults approach found so repugnant only a few years ago. In a sense, negotiators are trying to make a virtue of reality by devising a safeguards code that would allow governments to take discriminatory measures analogous to the politically seductive but extralegal orderly marketing arrangements and voluntary export restraint agreements that have become the measure of choice over the past two decades.[8]

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[7] Canada, Office for Multilateral Trade Negotiations, *Situation Report*, August 1989, Annex 1. For a discussion of the proposal and its shortcomings in more detail, see Hart, "The Canada-US Working Group on Subsidies."

Much of these relatively modest proposals for reform, however, stand little chance of being successfully negotiated on a multilateral basis.[9] Even if they become the basis for negotiations, they will be significantly watered down over the next few months. Either the EC or the United States or both are unprepared to go as far as proposed. Powerful interest groups have convinced European and U.S. officials that they need the kind of protection afforded by the contingency protection system. If anything, these groups believe the rules need to be 'improved' to make remedies more certain and easier to obtain. They have managed to rationalize their case by convincing legislators that these remedies protect them from "unfair" competition. U.S., European, and other legislators have accepted that only if other countries curtail "unfair" practices can there be any relaxation in the application of remedies.

Now, before I go on, let me clarify that my colleagues in government are not hopelessly naive, nor have they been fully captured by these protectionist interests.[10] They are stuck within a system that developed slowly over time and has proven increasingly resistant to wholesale reform. They are captive of the nature of international negotiations where progress is measured in inches, and where only the most profound crisis will stimulate meaningful reform. This is not new. The virtues of diplomacy include patience and a profound regard for precedence; they exclude provocative innovations and departures from the norm. The negotiations that spawned the modern multilateral trade and payments system in the late 1940s were only made possible by the complete breakdown of international order resulting from depression and war. Circumstances today are not analogous and a similar reordering is unlikely to evolve as easily.

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[8] Canada has not made any specific proposals in the Safeguards Group similar to those on antidumping and countervailing duties.

[9] Canada's antidumping proposal appears to have become the basis for a possible major reform of the GATT antidumping rules — major, that is, in the diplomatic sense, not in the academic sense.

[10] I continue to hope that this is the case, although some may have been awed by the elaborate arguments that have been devised supporting the continued maintenance of the existing system. While some of these have been developed by those with a vested interest in the system, there are others who are prepared to argue that the system serves useful public policy functions. For example, John Jackson believes that the system provides a necessary lubricant to soothe the natural frictions that arise from different political, social, and economic priorities as economies become more integrated through trade and investment. See John H. Jackson,...

Given this sad state of affairs, Trebilcock can be forgiven for taking refuge in the ideal and pronouncing a plague on those people in the practical world who continue to tinker with the existing system. But let us look at the solutions he offers and see if they offer any hope.

Two elements are central to his alternative scheme: a highly circumscribed safeguards regime replacing all three contingency protection remedies, and an emphasis on adjustment assistance programs whenever possible rather than trade actions. The rationale for his scheme is that the international rules should limit government measures responding to the pressures of trade adjustment to those instances where distributive or community impacts raise equity concerns. Equity concerns are largely confined to labor adjustment problems and again limited largely to those instances were trade threatens unskilled, immobile workers or single-industry communities. Owners of capital may be forgiven if they gag at this rather narrow definition of equity concerns.

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"Achieving a Balance in International Trade," *International Business Lawyer*, April 1986.

Putting aside the difficulty of developing criteria to determine which workers are sufficiently unskilled or immobile to warrant safeguard action, or which communities are deserving of special adjustment assistance, there is the problem of governments telling producers that have failed because of dumped or subsidized imports that their failure will benefit society as a whole. As wrongheaded as the current regime undoubtedly is, policymakers cannot ignore the fact that it responds to a perceived need, and unless they can devise a scheme that will respond to that need, their political masters will find it difficult to listen. In modern democracies, decisions are rarely motivated by abstract considerations of equity or distributive impacts.

In a similar vein, I believe it is politically naive to ask governments to develop international rules that will not allow them to respond to the pleading of the politically powerful, but give them license to devise programs that respond to the needs of the politically weak. By all means, governments should have in place a variety of programs of general application to provide a safety net for the weak and disadvantaged. But let us not develop international rules that encourage sector- or industry-specific adjustment programs or trade measures that maintain sectors that are no longer internationally competitive. Worldwide experience with textiles and clothing drove that lesson home. Both border and domestic measures were meant to protect marginal workers, but in effect perpetuated a no-win situation. Canadian experience with the fishing industry should also warn us of the pitfalls of this approach. We are now reaping the whirlwind of five decades of policy that sought to protect unskilled and immobile labor in regions with few immediate alternatives, policy that has ensured that no alternative would ever be acceptable.

Trebilcock's scheme does not seem to make much economic sense either. He believes that, on equity grounds, governments should be allowed to protect those with the least chance of making it. He wants to protect these people using, *inter alia*, discriminatory quotas that would limit imports from the most competitive — that is, the most successful. And he wants the newly industrialized countries and Japan, the successful, to make concessions that will help to sell this scheme to the governments of the unsuccessful. At least global quotas and the requirement to compensate created counterforces to domestic pressures seeking protection. The problem of the gray-area measures is not their lack of transparency, but the effective way they have neutralized these counterforces.

Finally, a word about Trebilcock's cry for greater transparency, a plea echoed by many others. Transparency has much to recommend it, but it is a two-edged sword. It robs governments of the ability to devise more creative and less punitive measures. Due process and public scrutiny come with a price, including rigidity. I question whether lack of transparency is a problem in North America. Certainly, no one can argue that the various protectionist measures in place in Canada and the United States are hidden from public view. They have been scrutinized and analyzed from every possible angle. In the United States, the Congressional Research Service alone regularly documents the costs to consumers and the economy of various regulatory and protective devices. I wish someone would explain to me, in practical terms, how greater transparency would save the world. We have a problem here, not with transparency, but with some questionable international rules and the domestic procedures they sanction.

The challenge for academic analysts, it seems to me, is to try to bridge the gap between the ideal and the possible, to advance advice that is sufficiently realistic to offer at least a small chance of success. Trebilcock's paper does not fit into that category. The analysis of the problem is correct; the solution, however, is not tenable either now or at any point in the foreseeable future. Nor is it very coherent. It offers a pastiche of ideas that do not necessarily hang together and that either individually or collectively stand little chance of ever being negotiated successfully.

While this short comment does not allow me to offer my own alternative, I have written elsewhere about the kinds of approaches that would make sense within a Canada-U.S. bilateral context and that can be readily adapted to multilateral negotiations as well.[11] I believe these to be based sufficiently on first principles to meet some, but not all, of the exacting criteria that Trebilcock sets out, while at the same time leaving enough scope for practical politicians to meet the seductive entreaties of producer interests. In short, they seek to establish a middle ground between the heady idealism of the academic analyst and the numbing reality of everyday policymaking.

My advice to Trebilcock is that by all means throw deep, but make sure there is someone out there to catch the ball. Otherwise, he will find that the coach will yank him in favor of someone who throws short but connects. Kenny Stabler may have been a gambler who liked to throw deep, but he also had a very high completion record. The long ball kept opposing teams wary, but the short ball won games.

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[11] See Hart, "The Future on the Table"; and idem, "The Canada-US Working Group on Subsidies." For a shorter version of the latter paper, see idem, "Subsidies, A Problem in International Trade?" in English, ed., *Pacific Initiatives in Global Trade*.

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The Art of the Possible: A Comment

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Jagdish Bhagwati has written that "[i]nternational economists have long been frustrated by the dissonance between the elegance of their irrefutable demonstration of the advantages of free trade and the inelegance with which practical politics embraces protection."[1] Michael Trebilcock has indeed presented an elegant intellectual case for the elimination of various "unfair" trade laws in favor of a regime of domestic adjustment assistance. As both a commentator and one immersed in the practical politics of Washington, D.C., some inelegant observations about the politics of trade would appear to be in order, since by his own admission Trebilcock has chosen not to engage in such a discussion.

An examination of practical politics suggests four propositions that lead me to diverge from Trebilcock's analysis. First, the governments of all major trading nations would, without question, support Trebilcock's call for effective domestic structural and labour adjustment policies. However, such public choices are not, and need not, be exclusive of other public policies. Second, various democratically elected governments consider that there are defensible political and economic rationales for the existing general approach to trade remedies. Third, the trade laws have, to some extent, been "captured"[2] by protectionists. Finally, in the real world of multilateral and bilateral trade diplomacy, an appropriate response should be the pursuit of reform to bring trade remedy laws closer to their underlying rationale, rather than to discard them completely.

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[1] Jagdish Bhagwati, *Protectionism* (Cambridge, Mass.: MIT Press, 1988), p. 72.

Several governments, including Canada, have determined that the protection of producer or competitor interests and the promotion of market-based conditions of competition are legitimate public policy goals. In their view, trade remedy laws — coexisting with competition laws — support these objectives.

Regarding antidumping, for example, the first U.S. statute focused on predatory price discrimination, and required a showing that lower prices were charged "with the intent to destroy or injure an industry."[3] By 1921, coverage had been expanded to cover other forms of price discrimination. The evolution of antidumping law in Canada was similar. Accordingly, antidumping laws may be viewed as addressing injurious international price discrimination — but perhaps other, legitimate practices as well; Article VI of the GATT, as well as ITO (International Trade Organization) and GATT preparatory discussions, reflect a consensus that at least some of those practices are to be condemned.[4] From a political perspective, the continued judicialization of their respective antidumping regimes by the United States and Canada manifest a useful if not necessary outlet for politicians, otherwise subject to demands for special interest relief, to refer complainants to an apolitical administrative procedure.

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[2] Ibid.

[3] U.S. *Revenue Act of 1916*, section 801, 39 Stat. 798 (1916).

[4] See the discussion in John H. Jackson, *World Trade and the Law of GATT* (Indianapolis: Bobbs-Merrill, 1968), sec. 16.2. But see also John H. Jackson and Edwin A. Vermulst, *Antidumping Law and Practice: A Comparative Study* (Ann Arbor: University of Michigan Press, 1989).

As for subsidies and countervailing duties, while the international trading community recognizes that "subsidies are used by governments to promote important objectives of social and economic policy," they have also determined that "subsidies may cause adverse effects" to international trade.[5] This determination is based on the economic rationale that subsidies can "reduce a producer's costs of developing, producing, or distributing a good relative to the costs of other producers of that good."[6] For countries whose markets are regulated in accordance with market principles, imports of subsidized goods may displace otherwise competitively priced goods produced domestically or in third world countries. Accordingly, if injury occurs, countervailing duties may be imposed to offset the resulting distortion in pricing, with a view to permitting product competition on market-based prices. Both producer and competition interests are seen as worthy of protection by a system of rules intended to redress the skewing of the ordinary play of market forces caused by subsidized goods. From a political perspective, as is the case with antidumping, the countervailing duty regimes in the United States and Canada also provide an important outlet for politicians.

The safeguards or "escape clause" regimes of both Canada and the United States are based on Article XIX of the GATT. They are designed to provide temporary relief to industries that are being seriously injured in "emergency" circumstances where unforeseeable surges in imports may otherwise have a more lasting impact on conditions of competition.

The rationale for the escape clause has been, and remains, that as barriers to international trade are lowered, some industries and workers inevitably face serious injury, dislocation, and perhaps economic extinction. The clause is aimed at providing temporary relief for an industry suffering from serious injury, or the threat thereof, so that the industry will have sufficient time to adjust to the freer international competition.[7]

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[5] GATT, *Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade* (the "Subsidies Code"), Article 8(1).

[6] A.E. Moroz, "Some Observations on Non-Tariff Barriers and Their Use in Canada," in John Whalley, ed., *Canada-United States Free Trade* (Toronto: University of Toronto Press, 1985), p. 245.

It may be suggested, therefore, that safeguards procedures have been adopted to provide a breathing space for structural adjustment to occur, since the benefits of freer trade may take longer to be felt domestically and have more diffuse effects than the burdens imposed by more liberal import access.

Safeguard measures for temporary relief may take the form of increased tariffs, import quotas, or orderly marketing agreements. Politically, such measures respond to importers' demands for restraint. For exporters, these measures may be preferable to more restrictive actions. Economically, it is interesting to note that nontariff restraints can provide "scarcity rents" to both importers and exporters.

Trebilcock is right to suggest that the trade laws have, to some extent, been captured by protectionists. Regarding dumping, for example, current regimes fail to differentiate between abuse of foreign market power and legitimate pricing responses to varying conditions obtained in different national markets.[8] Further, administering agencies often resort to a "series of complex and often questionable economic calculations in order to develop a level basis for comparison of foreign market value and [domestic] price."[9]

In the subsidies field, countervailing duties cannot reach some subsidies at all, and both Canadian and U.S. countervailing duty laws — at least as applied in some cases — may go beyond the bilateral trade effects of subsidies to judge the legitimacy of programs the subsidizing country may see as purely domestic. For example, the net effect of the Softwood Lumber Memorandum of Understanding,[10] which resolved the second U.S. lumber countervailing duty case against Canada, was not only to neutralize the border impact of Canada's stumpage practices, but also to lead Canadian provinces to reassess, and in some case to replace, their existing systems. To many Canadians, it challenged the sovereign right of their government to manage Canadian natural resources, if not to determine its own domestic economic policy. Similarly, the Canadian corn case[11] concluded that the U.S. domestic corn subsidy programs affected the price of corn in Canada, and found material injury on the basis of price suppression, even though imports from the United States were near the low end of their historical range.[12] At the same time, the Code does not contemplate and neither law has been used for imposing countervailing duties where there is no crossborder trade. Yet subsidies with import substitution effects and investment incentives may have a significant impact on a trading partner.

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[7] United States, Congress, Senate Committee on Finance, S. Rep. No. 93-1298, 93rd Cong., 2d Sess., 119 (1974).

[8] David Palmeter, "The Capture of the Antidumping Law", *Yale Journal of International Law* 14 (1989). See also J.A. Ordover, Alan Sykes, and R.D. Willig, "Unfair International Trade Practices," *New York University Journal of International Law and Politics* 15 (1983).

[9] George Kleinfeld, "A Critical Evaluation of U.S. Fair Trade Policy," *Van-derbilt Journal of Transnational Law* 18 (1985): 523.

The "escape clause" has in fact provided an escape from international disciplines. Such gray-area measures as voluntary restraint arrangements remain outside internationally agreed trading rules. Domestic interpretation of the prerequisites for Article XIX-based relief has reduced considerably the relevance of such standards as "unforeseen developments" and the effect of GATT obligations, as well as of "serious" injury.

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[10] Alan Holmer and Judith Bello, "The U.S.-Canada Lumber Agreement," *International Lawyer* 21 (1987).

[11] Canadian Import Tribunal, *Grain Corn Originating or Exported from the United States of America*, Inquiry No. CIT-7-86

[12] M. Jean Anderson and Jonathan T. Fried, *Subsidies and Countervailing Duties in the U.S.-Canada Free Trade Agreement*, Commercial Law and Practice Course Handbook Series 494 (New York: Practising Law Institute, 1989), p. 133 et. seq.

Although more recent trends are encouraging, over the past several years relief has been granted and maintained without sufficient regard to the competitiveness of the domestic industry or its adjustment plans. Certainly, measures lasting ten years or more can hardly be said to be "temporary."[13]

Accordingly, Trebilcock is right to call for trade law reform. However, the elimination of trade remedy laws as he proposes ignores the public policy choices described above, and is therefore a practical impossibility in the foreseeable future. Incremental reform of trade law is, on the other hand, both necessary and desirable to "re-capture" these laws; more significant progress may be possible in a bilateral context.

Regarding antidumping, for example, in the current round of multilateral trade negotiations, GATT members are considering improving the rules governing standing of complainants, evidentiary standards, calculation of constructed value and of sales below cost, causation, and the relevance of public interest factors — all with a view to ensuring that antidumping duties are imposed only in circumstances where there is a distortion in conditions of international competition.

In a bilateral context, more significant reform may be possible: with the removal of tariff and nontariff barriers to trade, artificial segregation of markets will be more difficult. Domestic predatory pricing and price discrimination laws may suffice, if appropriate changes are made to address transborder practices in a manner that respects international limits on the exercise of jurisdiction.[14]

Similarly, proposals on subsidies and countervailing duties in the multilateral trade negotiations support more rigorous standards for specificity, financial contributions, injury, and *de minimis* exclusions.[15] And the "red light, yellow light, green light" framework dismissed by Trebilcock would appear to offer some promise. Further, the Organisation for Economic Co-operation and Development's Export Credit Arrangement provides a useful precedent for "ratcheting down" levels of one form of distortive subsidization.

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[13] See Ursula Kobel, "Textile Import Policies: A Reappraisal," in Richard Wright, Hamid Etemad, and K.C. Dhawan, eds., *International Business: A Canadian Perspective* (Don Mills, Ont.: Addison-Wesley, 1981), p. 103.

[14] See Douglas E. Rosenthal, "Antitrust Implications of the Canada-U.S. Free Trade Agreement," *Antitrust Law Journal* 57 (1988); Mark Gillen et al., "Canadian and U.S. Antitrust Law: Areas of Overlap Between Antitrust and Import Relief Laws," *Canada-United States Law Journal* 12...

Bilaterally, again, more significant progress may be possible. With similar systems for economic regulation, Canada and the United States may be able to agree more readily than the international community on a category of permitted (green light) subsidies — that is, those recognized as serving community and other legitimate domestic objectives, such as for infrastructure, the environment, research and development, and for reducing regional economic disparity. Conversely, a category of prohibited (red light) subsidies may provide a means of achieving a ceasefire or a "standstill," through, for example, an agreement governing specific sectors or specific tools such as investment incentives).[16]

Regarding safeguards and gray-area measures, an international consensus appears to be emerging to reestablish multilateral control over such measures by ensuring greater respect for the substantive prerequisites for such measures, including their limited duration. Bilaterally, as Trebilcock acknowledges, the provisions of Chapter 11 of the Canada-U.S. Free Trade Agreement take us further toward ensuring a market and labour adjustment-based regime for emergency action by im-

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(1987); and Peter C. Carstensen, "Competition Policy for an Economically Integrated North America," *Law and Contemporary Problems* 44 (1981).

[15] Canada, Minister for International Trade, *News Release*, No. 158, June 28, 1989; See also U.S. and European Community proposals reprinted in *Inside U.S. Trade*, Special Report, December 1, 1989.

[16] See Anderson and Fried, *Subsidies and Countervailing Duties in the U.S.-Canada Free Trade Agreement.*

posing a clear causation standard, a higher injury threshold, a link to the effects of trade liberalization, a finite time period for maintenance of relief, and a binding dispute settlement.

In summary, in this less-than-perfect world, we should accept as given that democratically elected governments will continue to respond to domestic interests through the promulgation and maintenance of a system of domestic trade laws carrying international sanction. As Douglas Rosenthal has noted,

> When a domestic industry is finding it difficult to compete with foreign products in its home community, the intensity of the pain is deep: workers are laid off, local economies are depressed, and shareholder equity and income are reduced. When trade relief is granted, consumers pay more for a product, but the loss is less immediate and less intense, and it is shared more broadly throughout the population...[T]here is the sense that it would be self-indulgent to focus excessively on consumer interest when the basic well-being of established enterprises, their employees, and their surrounding towns, is at stake.[17]

The imperative for governments, therefore, must be to mitigate the antimarket effects of trade remedy laws. We can be encouraged by the fact that this is taking place both bilaterally and multilaterally.

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